

Volume 17

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,)	
)	
Plaintiff,)	
)	
VS.)	No. C 10-3561 WHA
)	
GOOGLE, INC.,)	
)	
Defendant.)	San Francisco, California
)	May 7, 2012

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

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(Appearances continued on next page)

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P R O C E E D I N G S

MAY 7, 2012

7:46 A.M.

(Proceedings held in open court, outside
the presence and hearing of the jury.)

THE COURT: Good morning. Have a seat please. Back
to work.

So the jury is still assembling. We can do some work
though until we hear from them.

So a number of motions have been made concerning the
patent phase, so let's go first to the Oracle motion concerning
Mr. Schwartz.

MR. JACOBS: The heart of this motion, your Honor, is
a question to all of us, which is whether we're going to
continue the Schwartz testimonial struggle in Phase 2 or
whether we're going to leave that behind into Phase 1.

Google has answered that with its response to the
motion; that they believe Mr. Schwartz's testimony about not
having -- concluding that there were not grounds to sue Google
is relevant to Phase 2. Although looking closely at their
opposition, it's not apparent to what jury issue it is
relevant.

The opposition says laches. The opposition says,
then of course, that's an issue for the bench. But the
opposition goes on and say maybe this goes to wilfulness

1 because how could Google have had -- or even the intense
2 standard on inducement, because how could Google meet that
3 intense standard if Sun's own CEO had testified as he did in
4 court.

5 So I fear, based on that opposition, that that issue
6 is going to arise again in Phase 2 and so we have to be
7 prepared to address it. We will do so.

8 We have -- unless the Court rules or Google withdraws
9 its stated intention, we have evidence and witnesses lined up
10 to establish that the testimony Mr. Schwartz gave in Phase 1
11 was false and that, in fact, we -- quote, unquote, we -- had
12 never made such a determination both with respect to a decision
13 not to sue Google and with respect to whether such a lawsuit
14 would have had -- would have been meritorious.

15 So that's where we are. In a sense, we accomplished
16 our purpose by finding out from Google whether this is all
17 going to occur.

18 I would like to emphasize that because of the way the
19 trial is structured, any ruling on this question needs to cover
20 opening, evidence, and closing. So if the Court were to decree
21 or Google were to commit that this was not going to occur --
22 that this issue was not going to arise in Phase 2, we need to
23 be covered all the way through. If it could pop up in closing
24 by way of reference to testimony in Phase 1, then we need to be
25 prepared to meet it with evidence in Phase 2.

1 **THE COURT:** Mr. Van Nest.

2 **MR. VAN NEST:** Good morning, your Honor.

3 **THE COURT:** Good morning.

4 **MR. VAN NEST:** This may be a little premature. I
5 certainly don't have any plans to mention Mr. Schwartz in my
6 opening in the patent phase, and I'm taking your Honor's
7 guidance to heart. I mean, I think Phase 2 we ought to really
8 be focused on the technology and the key infringement questions
9 and that's what I would like to do.

10 I propose the trade that your Honor recommended on
11 Friday; that I would not call Mr. Schwartz if they didn't
12 parade Mr. Lindholm and all that stuff through and that was not
13 accepted.

14 So my view is that with respect to Mr. Schwartz, I
15 don't plan to mention him in the opening. I haven't made a
16 decision. I would prefer not to call him in Phase 2, but,
17 obviously, if they are going to be in here with Lindholm and
18 Mr. Rubin, parading a bunch of emails around and making a big
19 deal about the fact that, Oh, everybody knew about patents and
20 this and that, I feel as though I have to leave him on the list
21 to protect myself. Obviously, his testimony is already in
22 evidence. I understand from your Honor that I can't repeat
23 testimony in Phase 2 that was given in Phase 1.

24 I sort of took their motion as a motion to strike,
25 but maybe that's not the case. Certainly, that's not timely.

1 They cross examined Mr. Schwartz on all this. They didn't
2 object when I mentioned him in my closing. They argued
3 extensively about him in their closing.

4 So at the end of the a day I think he is relevant to
5 waiver and laches and infringement certainly, and probably
6 damages. But, again, I would rather not call him in Phase 2 if
7 I don't have to, but I'm worried that if they get up and want
8 to talk about all the good old days at Sun and all the patents
9 that people knew about, then I need to be able to call him to
10 say we always used patents defensively. They publicly stated
11 they never asserted patents offensively. There were
12 instructions to Sun folks not to look at patents and to do
13 their own work independently of every one else, which is the
14 same thing that Google engineers are told.

15 So, really, I have him on my list as a defensive
16 measure. I would rather not call him, but his testimony is in
17 the record. He's still relevant and I don't think their motion
18 is well taken.

19 **THE COURT:** Did you have more to say?

20 **MR. JACOBS:** Briefly, your Honor.

21 Some of these motions overlap, so Mr. Van Nest and I
22 did discuss the question of the trade that your Honor proposed.

23 We do have a burden on indirect infringement in
24 Phase 2. Recall in Phase 1 we had a burden on indirect
25 infringement and by the time of the verdict, the issue was

1 stipulated to for Phase 1 purposes; but in Phase 2 we have no
2 such stipulation.

3 And our burden on Phase 2 is to meet the intent
4 standard required for indirect infringement and that's a
5 combination of knowledge and intent to cause infringement. And
6 it is for those purposes that we will be relying on people like
7 Mr. Lindholm, who published a book chapter on one of the --
8 essentially on the '104 patent.

9 So that's why this issue is not as pristine in a
10 sense, not merely technical. Of course, if Google would
11 stipulate to indirect infringement of the phone models that are
12 in the case, then the indirect infringement issue would go away
13 and the trial could be trimmed in that regard, but I don't
14 anticipate such a stipulation.

15 So the overlap here is between how they might -- how
16 Google might perceive a need to use Schwartz defensively as we
17 meet our offensive burden in Phase 2 to establish knowledge and
18 intent.

19 **THE COURT:** Let me hear everything else on Lindholm
20 before I make a ruling. There's a Google motion on Lindholm.

21 **MR. VAN NEST:** There is, your Honor.

22 **THE COURT:** Go ahead.

23 **MR. VAN NEST:** Again, this is more to the point of
24 preventing Phase 2 from becoming a battle of sort of sideshows.

25 They have now -- after your Honor's comments Friday,

1 now Lindholm has moved up to be their lead-off witness. He's
2 No. 1 on their list. And you heard Mr. Jacobs say he's
3 important to establish knowledge of patents.

4 Well, let me tell you what the evidence is on it and
5 why it really doesn't bear on Phase 2.

6 They do have to show knowledge of the patents-in-suit
7 as part of their showing of indirect infringement in Phase 2.
8 Mr. Lindholm co-authored a book back in 1997 that your Honor
9 has seen. It's one of the *Java Specification* books. It's the
10 virtue machine spec book. There is one line in it that makes a
11 reference to the '685 patent which is not a patent-in-suit.
12 The '685 was a predecessor to the '104 which is in suit, but
13 the '104 -- '685 was abandoned in '99 and the '104 issued
14 sometime after that.

15 **THE COURT:** Wasn't the '104 some -- didn't it in some
16 way descend from the '685?

17 **MR. VAN NEST:** It did. It did. But the way it
18 works, the '685 is essentially retired in '99 and the '104 is
19 applied for. The claims are different in the '104 from the
20 '685.

21 Now, Mr. Lindholm -- remember, this is all back in
22 the '90s. So his second edition of the book came out in '99.
23 There is no mention of any patents in it. The '685 or '104 are
24 not in it. So the only thing they have got is one line in a
25 book in '97. Mr. Lindholm came over to Google. He didn't play

1 any role in designing.

2 In this phase we're going to be talking about the
3 Dalvik Virtual Machine and some of the developer tools that are
4 used with it. He didn't play any role in designing either of
5 those. He wasn't on the design team. He didn't contribute any
6 ideas. He didn't work on the Dalvik Virtual Machine. He
7 didn't work on the Java language at Google. He's worked on
8 other things.

9 And there is no evidence from anybody in Phase 1 or
10 in any deposition. There is no document. There's nothing to
11 show that Mr. Lindholm spoke with anyone about any patents at
12 Sun, including the '104 or the '520. There is no documents
13 showing that. They have deposed Mr. Rubin five or six times.
14 There is no evidence that he ever spoke to Mr. Lindholm. They
15 have deposed Mr. Lindholm a couple of times. There is simply
16 no evidence.

17 So this is a situation where what they want to do is
18 create a big sideshow and this will spill over onto Mr. Rubin.
19 We have a second motion which Mr. Anderson is going to discuss.
20 This huge sideshow where, since they can't talk about licensing
21 like they did in Phase 1, they want to talk about, Oh, these
22 guys were at Sun, or they knew Sun had patents, or Sun had a
23 big portfolio and this and that. And unless they can show that
24 these patents were known among the thousands of Sun patents out
25 there or were disclosed or somebody said, "Yeah, you're

1 infringing these," or somebody called them to their attention,
2 it's all irrelevant. It's all a bunch of hand waving.

3 That's why I have Mr. Schwartz on my list and that's
4 why we are prepared to go down this road. Although I agree
5 with your Honor, Phase 2 will be a lot more focused for our
6 jurors if we focus on, okay, what are the claims in the patent,
7 and what does the Dalvik do, and does the Dalvik technology
8 infringe these claims?

9 But, again, the Lindholm stuff and the Rubin stuff,
10 which Ms. Anderson will discuss, is a piece.

11 **THE COURT:** Mr. Rubin is a different story. We're
12 not going to talk about Rubin right now. We're talking about
13 Lindholm.

14 **MR. VAN NEST:** Fair enough.

15 So with respect to Mr. Lindholm: A, it's
16 prejudicial. B, it's irrelevant. C, it's a sideshow. And, D,
17 it opens up the prospect that I then have to call Mr. Schwartz
18 and all that to say Sun always used patents defensively not
19 offensively and Sun engineers were told, "Don't look at
20 patents, focus on your own work."

21 So, again, I don't think it has any relevance and I
22 don't think it ought to be allowed in Phase 2.

23 **THE COURT:** Let me ask Mr. Jacobs: Is it true that
24 that was Sun's stated policy; that they didn't sue?

25 **MR. JACOBS:** Actually, first I've -- I'm sorry.

1 Which part, your Honor?

2 **THE COURT:** I just heard that the stated policy of
3 Sun was not to sue on patents.

4 **MR. JACOBS:** There's a reference in one of the
5 documents to a comment by Mr. Schwartz about using patents
6 defensively. And so the question will be if that's dispositive
7 of Sun policy, there's all sorts of evidence that Google was
8 worried about Sun patents, notwithstanding another Mr. Schwartz
9 statement. What does "defensive" mean in this context when
10 this is a business assault, if you will, on the Java business.

11 So, yes, there some a comment to that effect, but it
12 is, we will argue, not highly probative.

13 **THE COURT:** A public comment or was it an internal
14 comment?

15 **MR. JACOBS:** I believe it's a public comment.

16 **THE COURT:** When did he make that comment?

17 **MR. JACOBS:** I think it's 2000- -- it's 2006, but I'm
18 not positive.

19 And, of course, Sun did sue on patents in the
20 Microsoft litigation when someone forked Java.

21 So, in any case on Mister --

22 **THE COURT:** Was that a counterclaim or was that a
23 direct suit? Who sued first in --

24 **MR. JACOBS:** Sun did.

25 **THE COURT:** Sun did. On patents or on copyright?

1 **MR. JACOBS:** You know, your Honor, I would like to
2 make sure I'm really precise in answering these questions and I
3 haven't looked at that litigation file in preparation for this
4 motion.

5 You will recall in the damages context there was a
6 patent cross license that was executed between Sun and
7 Microsoft that resulted in a very substantial payment to Sun.

8 **THE COURT:** What do you say to Mr. Van Nest's point
9 that the '685 was forfeited or abandoned and new claims were
10 made and that Mr. Lindholm never said a word about '104 or the
11 claims in '104?

12 **MR. JACOBS:** I don't think that's highly probative
13 here. The '104 is a reissue of the '685. You look at the
14 front piece of the '104, the '685 is right there.

15 The question is: As Mr. Lindholm was giving all of
16 his advise that we've seen in document after document about the
17 need for a license, can the jury draw a reasonable inference
18 that one of the reasons he was concerned about the need for a
19 license, whether it was in 2005 or 2006 or even 2010, with Sun
20 patents was with the '104, one of those patents, was the -- and
21 was Google willfully blind to the Sun patents?

22 So one of the issues that Google's argument on this
23 could whole cluster of motions leaves out is the willful
24 blindness standard. The willful blindness standard applies
25 very well here because in the leading case that led to willful

1 blindness being articulated by the Supreme Court, the case
2 there was of a defendant who had copied the plaintiff's product
3 and didn't tell its counsel it had copied the product when the
4 counsel was doing an opinion. The defendant wanted to rely on
5 that opinion, even had an opinion, and the Court said, no, this
6 was a whole pattern of willful blindness to the risks of patent
7 infringement.

8 And that's our case here. In the case of the -- of
9 Dalvik, in particular, it starts out as a Java Virtual Machine.
10 We see document after document that says we're going -- there
11 is a critical license that's needed for the Java Virtual
12 Machine. They download and install in their developer
13 environment for Android the Java compiler. They bolt on its
14 dx converter. Dalvik had a different bytecode, but it's the
15 same basic architecture in terms of it being the virtual
16 machine facing the same basic performance challenges as the
17 Java developers did. And all the testimony will be that Google
18 never looked to see whether that might infringe any of the
19 patents, but particularly including the '104 patent that Mr.
20 Lindholm wrote a whole chapter about in this book and
21 prefigured by dropping a footnote, it's extraordinary. I've
22 never -- it's so unusual to see a note in a book that says
23 something like, "The technology in this chapter is covered by
24 U.S. Patent No. '685 patent."

25 So I think we've got a pretty good case for the jury

1 on willful blindness. The facts line up quite closely with the
2 Supreme Court's decision. And to try -- and then to exclude
3 all of that and say, no, none of that comes in is a matter of
4 law.

5 In essence, what Google is arguing to your Honor is a
6 summary judgment motion. As a matter of law, there is no
7 willful blindness case here. And Oracle cannot put on a
8 willful blindness case. That would be quite extraordinary
9 given the facts.

10 **THE COURT:** Yes, Mr. Van Nest.

11 **MR. VAN NEST:** Let me start with Mr. Schwartz.

12 He repeatedly said we used patents defensively, not
13 offensively. There is a famous statement in one of his blog
14 posts that says, "We at Sun innovate, not litigate." Innovate,
15 not litigate.

16 **THE COURT:** Then why did they sue Microsoft?

17 **MR. VAN NEST:** I will check. I don't think that's a
18 patent case. I think that was a -- I think that was antitrust
19 case and possibly copyright, but in any event it's a public
20 statement, as Mr. Jacobs acknowledged. It's made repeatedly
21 over time. There are statements in the day that back it up.

22 And by the way, since Mr. McNealy was here saying
23 that the blog post was some sort of a personal thing, we
24 noticed it's actually filed with the SEC. There's SEC notices
25 typically on Mr. Schwartz blog post. So just like when Mr.

1 Ellison speaks at JavaOne, they file a SEC disclosure. The
2 same is true when Mr. Schwartz speaks.

3 But coming back to Mr. Lindholm, it's absolutely the
4 case that he doesn't say anything anywhere about the '104. He
5 doesn't say anything anywhere about these claims of the '104.
6 They've got one line in a 1997 treatise -- not treatise, but a
7 textbook. In the second edition in '99 there isn't a word
8 about either one of these patents. And, again, whatever the
9 willful blindness standard is, you can't meet it by putting
10 testimony in about one line in a book in 1997 on a patent
11 that's not even in issue.

12 And, again, I'm not the one wanting to open the door
13 to the sideshow, but if we're going to have them ignoring the
14 technology and basically saying, "You needed a license. You
15 needed a license. You needed a license," I need to have the
16 ability to defend myself and my client. And I don't think any
17 of this is relevant.

18 And, again, as I said, I would rather not call Mr.
19 Schwartz if I don't have to, but I really don't think Mr.
20 Lindholm's testimony adds a thing. It's just another sideshow.

21 **THE COURT:** Well, is it true that there was an entire
22 chapter and the footnote said everything in this chapter is
23 covered by the '685 patent?

24 **MR. VAN NEST:** I haven't studied the footnote, your
25 Honor, but it's certainly true that there is a one-line

1 statement in the text that says the '685 patent is relevant to
2 what is discussed here in the virtual machine.

3 Now, in the second edition the whole chapter drops
4 out. The second edition in '99, which is at the time that the
5 '685 goes away, that whole chapter drops out of the book. So
6 the chapter is gone. Any reference to patents is gone.

7 And, again, there is no evidence linking it up with
8 anything that happened at Google. It would be one thing if he
9 was the critical lead designer on Dalvik, or if he was involved
10 in designing the pattern matching that is accused with respect
11 to the '520, or the symbolic to numeric reference resolution,
12 which is the subject of the '104. There is no evidence of
13 that.

14 He testified in Phase 1 that he had no role in any
15 design activities. He wasn't involved in the Dalvik. He
16 wasn't involved in any of this. And, again, they have had all
17 this discovery, as your Honor is well aware. I don't know how
18 many days of Rubin and how many days of Lindholm. There is not
19 a single document anywhere, not an email, not a memo, nothing
20 to show that there was any discussion by Mr. Lindholm about any
21 of these patents-in-suit or any others with anyone at Google.

22 He had a non-disclose at Sun, like all these
23 engineers do. He respected it. That's it.

24 The testimony is that early on he, was in a couple of
25 meetings to introduce the Google folks to his colleagues at Sun

1 and that was pretty much it until he wrote the Lindholm email
2 in 2010.

3 So, again, if there is any conceivable relevance, it
4 is minimal. And it certainly doesn't justify the sort of
5 sideshow they want to invite by putting him on as their first
6 witness and waiving the book around and maybe reminding jurors
7 about his email. I don't even know what. That's really not
8 what we should be focused on in Phase 2. And I think it would
9 be improper to do it.

10 **THE COURT:** What do you say, Mr. Jacobs, about the
11 fact that the subsequent edition of the book did not have that
12 chapter?

13 **MR. JACOBS:** Well, I think it actually proves that as
14 they were writing the subsequent edition, he was refocused on
15 the first edition and making a decision whether to include this
16 chapter. The chapter isn't included because the documentation
17 gets more and more focused on exactly what a programmer needs
18 to know. And this is an internal function. The '104 patent is
19 an optimization technique. And so as the documentation gets
20 refined, a decision is made by the editors this isn't
21 necessary, but a decision was made.

22 So the first edition is in front of him in 1999 and
23 he's thinking, "Do I need this chapter at all?" And they
24 decided no, we don't need to cover this technique.

25 I think all of this back and forth, your Honor,

1 proves how factual this is.

2 **THE COURT:** Well, wait, wait. In his deposition -- I
3 assume he was deposed, right?

4 **MR. JACOBS:** He was deposed. But you may recall that
5 the deposition of Mr. Lindholm was a very short deposition
6 ordered by the magistrate judge late in the process, and it was
7 focused on the Lindholm email. There are --

8 **THE COURT:** Well, did he admit that he knew the '104
9 was the '685?

10 **MR. JACOBS:** I don't think he was asked that
11 question, your Honor.

12 **THE COURT:** Is he here right now? Is he out in the
13 hallway?

14 **MR. VAN NEST:** He is in San Francisco, but not here
15 in the courthouse, your Honor.

16 **MR. JACOBS:** What Google is rendering and this topic
17 leaves out is all of the emails from Mr. Lindholm advising Mr.
18 Rubin on licensing issues associated with Android, and even on
19 technology choices.

20 So he makes very specific recommendations. We should
21 go with CDC, not CLDC. Lindholm is not remote from Android.
22 Lindholm is deeply embedded in the Android project. The fact
23 that he was focused on intellectual property issues, on
24 licensing issues, only reinforces the relevance of his
25 testimony. He is not just a mere implementer or a mere coder.

1 He's the guy helping out on the, quote, critical negotiation
2 with Sun.

3 So to exclude him on the grounds that wasn't a coder
4 is to miss the essential relevance of what Lindholm was up to.
5 He knew all about Sun's licensing, and he knew about Sun's
6 intellectual property. And we will establish that through his
7 testimony.

8 And Google proceeded with Android willfully blind of
9 the patent risks they were facing, including very specifically
10 on the '104 patent. That's what we will ask the jury to
11 conclude. And I don't think that that can be ruled out as a
12 matter of law at this stage through motions in limine.

13 **MR. VAN NEST:** Your Honor?

14 **THE COURT:** Yes.

15 **MR. VAN NEST:** I do think -- I do think if your Honor
16 is inclined to do it, this would be something that should be
17 explored, at least initially, outside the presence. And we can
18 get Mr. Lindholm here. I can assure you that --

19 **THE COURT:** Well, if he was here, I would do that,
20 but he's not here. He's probably at your law office. He
21 should be here.

22 So, I'm sorry, but I -- I was going to let you do
23 that if he had been out in the hallway, like he should be,
24 ready to go.

25 **MR. VAN NEST:** I apologize. I wasn't sure what this

1 morning's agenda would be.

2 But certainly, certainly there is nothing significant
3 about any of this. And I don't think that the first time we go
4 through this drill it ought to be in front of the jury. I
5 think it ought to be here in court.

6 **THE COURT:** I disagree. We're going to let Lindholm
7 testify. Here is the reason. Willfulness is an issue for
8 indirect infringement. So the plaintiff has the burden to
9 prove willfulness.

10 Now, one way to meet that -- I don't know. I'm not
11 sure it would be enough to stipulate to that, so I'm not going
12 to suggest that.

13 Now, what troubles me the most about it is that while
14 he wrote about the '685, he did not write about the '104. And
15 it's a gap in the plaintiff's logic to say that because he knew
16 about the '685, he must have known about the '104.

17 So I am going to order this: That you cannot show
18 that email again until after you have established in front of
19 the jury that there is enough evidence that he had on his mind
20 '104 equals '685. If you don't cover that gap, then we're not
21 going to get back to that email, which I know is the real
22 reason you want to bring him forward.

23 So you must start with that book and do it the hard
24 way, which is show that he knew about the '685. The whole
25 chapter was there. He explained what it meant. The '104,

1 somehow make that equation. Now, I will give you a lot of
2 latitude on that.

3 I'm not saying he's got to admit it in so many words
4 because I know enough about the way this case has been prepared
5 that no witness favorable to any side is going to admit
6 anything in unless they've got to. So I will give you have
7 some latitude on '685 equals '104, but if you don't come close
8 to that mark, there is no point in getting back into that
9 email, which I know is the real reason you want to put him on
10 the stand. So that is the ruling on Lindholm.

11 With respect to Mr. Schwartz, I'm not going to make a
12 final ruling on this yet. I have a number of things I want to
13 say about that.

14 No. 1. In litigation, I have practiced law enough to
15 recognize a spring gun when I see one. That witness seemed to
16 me -- he was asked this question, something like: Did Sun ever
17 make a decision whether to sue? That could have been answered
18 "yes" or "no." But he then says, "No, we didn't think we had
19 grounds to." Now, in that one sentence, if you think it
20 through -- which I know all the lawyers have -- that implicates
21 so much attorney-client material, so ambiguous.

22 For estoppel purposes the only thing, moreover, that
23 would have mattered was what was communicated publicly or to
24 Google, not what their private thinking was. No one can rely
25 upon the private thinking of another company because by

1 definition it is private and you don't know it.

2 So the fact that they didn't -- even if it's true,
3 that they felt they had no grounds to sue on, unless that was
4 communicated to Google, Google had no basis on which to rely on
5 that. That was a completely volunteered statement that was not
6 responsive to the question. However, no motion to strike was
7 made. I would have granted it immediately. No motion to
8 strike was made. And instead counsel chose to cross examine
9 that and did an effective job on cross examining it, but there
10 it is. It was in the record. Not objected to. It was cross
11 examined.

12 It should not have been uttered in the first place.
13 The witness should have told not to utter statements like that
14 and, nonetheless, it came out.

15 So insofar as this has anything -- if Mr. Schwartz is
16 going to testify on this point again for an issue that has only
17 to do with an issue that the judge has got to decide, it will
18 be only in front of the judge. That much I am positive of. So
19 he can -- he can volunteer all he wants in front of me because
20 I can sort out what is attorney-client and not attorney-client
21 and what he should and should not be saying. It will not be
22 allowed in front of the jury.

23 Now, if there is some issue that is a jury issue,
24 then I would let him testify to that sort of thing in the
25 presence of the jury.

1 But let's think about willfulness for a minute.
2 Would it have anything to do with willfulness? Well, remotely,
3 except for this. It opens up the attorney-client privilege.
4 What were the real conversations that went on to which Mr.
5 Schwartz might have been a party? I know enough about how
6 those kind of conversations would have worked. It could have
7 been anything from, "We have strong grounds to sue on, but in
8 order to keep corporate peace, we're not going to do that."
9 That could have been one ground. That could have been one
10 version of that attorney-client conversation.

11 So this -- this vague statement, this broad
12 pronouncement by Mr. Schwartz that he didn't think they had
13 grounds to sue on is probative of nothing, unless we open up
14 the attorney-client privilege. So I don't even think it has
15 much to do with willfulness.

16 Now, there is another part of this motion, whether
17 the judge should instruct the jury that -- to disregard the
18 previous testimony. I have that in mind and I'm not going to
19 rule on that yet. But remember this, the issue here, the
20 reason we are here is to find out whether or not there are
21 grounds to sue on under the law as the judge gives it to the
22 jury. The jury is going to make the decision whether there are
23 grounds to sue on, not Mr. Schwartz.

24 So if there had been a motion, I would have had -- I
25 would have -- I would have excluded that sentence in a

1 heartbeat. I think I would have heard you out on that, but I
2 believe that that should have never come in in the presence of
3 the jury.

4 I don't want to fault Mr. Jacobs for not objecting
5 because he made a choice that he would cross examine it. He
6 did a good job on that. So lawyers can go both ways on that.
7 Sometimes it's better not to object. But you did -- you did
8 let it go by. You did not ask to strike it at the time and I'm
9 not going to strike it out of the record at this late date.

10 The only question that I am considering is whether or
11 not in the closings to -- before the closings is to instruct
12 the jury that it's to them to decide whether there are grounds
13 to sue on, not up to Mr. Schwartz.

14 I will order you not to make reference to Mr.
15 Schwartz in the opening statement. There is no basis on which
16 to bring him up again, as far as I can see, in the opening
17 statement.

18 Now, as the evidence unfolds in the patent part,
19 I'm -- I may be able to see some angle at which his testimony
20 has relevance, in which case you could use it in the closing;
21 but I don't see it and you said you don't plan to bring it up
22 anyway.

23 Now, to circle back to Lindholm. I think there is
24 a -- it's not the same kettle of fish. There is -- it's not
25 quite the same analysis. I've already gone through that. But

1 there is an important caveat, and that is: You may not get
2 back into that email. I don't even want you to use it in your
3 opening statement. Don't use that email in the opening
4 statement again unless you -- no, because you haven't connected
5 up that Lindholm had something to do with that -- with willful
6 and '685 equals '104. That's what you've got to prove and you
7 can try to prove that in front of the jury.

8 All right. So that's the ruling on Lindholm and
9 Schwartz for the time being.

10 Now we go to -- we will go to the Andy Rubin, Andy
11 Rubin motion, which is related to this.

12 Go head, Ms. Anderson.

13 **MS. ANDERSON:** Thank you, your Honor. Good morning.
14 Christa Anderson for Google.

15 Your Honor, this is the motion that focuses on
16 exclusion of testimony that Oracle has designated to play
17 before the jury in this case that they -- questioning in which
18 Oracle asked Mr. Rubin about -- generally about what Google did
19 or didn't do to investigation the scope of Sun's patent
20 portfolio. Some of the questions were directed at Mr. Rubin
21 individually, some generally at Google. But the thrust of this
22 questioning all surrounds what investigation was made into
23 Sun's patent portfolio.

24 All of these questions focused on the multi-year
25 period preceding suit during which it's undisputed that Sun and

1 Oracle had not disclosed the specific patent numbers at issue
2 in this case to Google. Because of this, letting this
3 testimony go before the jury will violate both Rule 402 and 403
4 because it will confuse the jury and mislead them to thinking
5 there is some affirmative duty to investigate another company's
6 patent portfolio.

7 Just to back up for a moment --

8 **THE COURT:** But why isn't there?

9 **MS. ANDERSON:** There isn't --

10 **THE COURT:** If you know that you're going to be using
11 Java and Java has some patents that protect. I thought that
12 was the law, that you had to do some investigation.

13 **MS. ANDERSON:** Actually no, your Honor. And under
14 the law regarding indirect infringement, obviously, generally
15 speaking, plaintiff is required to prove actual knowledge of
16 the patent.

17 Here Oracle wants to show willful blindness which was
18 a standard allowed in the *Global-Tech* decision. It's a narrow
19 standard that allows satisfying of the scienter requirement
20 only where the plaintiff is able to show the defendant
21 subjectively believed there is a high probability that a fact
22 exists and took a deliberate act to avoid learning of that
23 fact.

24 That standard is higher than recklessness. Higher
25 than reckless indifference. Higher than negligence. And under

1 cases like the *Apeldyn* case, which we cited to your Honor, it
2 is not satisfying of that standard simply to show that a
3 defendant company knew about the possibility that there were
4 patents out there, made an affirmative decision not to go
5 investigate the scope of another company's patent portfolio,
6 that is not enough.

7 In the *Apeldyn* case that we cited to your Honor from
8 2011, which post dated *Global-Tech*, in that company the
9 defendant had made the decision it would not initiate a
10 collection of patents that had been issued to other companies
11 in the very field that it was working in, unless there had been
12 a specific request from an internal lawyer to do specifically
13 that thing. And it had tried -- it had not tried to gain
14 knowledge other companies' patents.

15 This is -- that particular fact pattern, the Court
16 said, that's not enough to show willful blindness. You have to
17 have a situation like you had at *Global-Tech* where you had a
18 defendant that actually decided to take an affirmative act --
19 in that case they took and copied a particular fryer. They
20 asked for a use, approval from their own attorneys, and didn't
21 tell their attorneys that they had actually taken the fryer
22 from the market and where they had bought it.

23 So they had taken an affirmative act to conceal what
24 had happened, and they had made an affirmative decision not to
25 tell their lawyers what they had done. That was a step beyond.

1 For the Court that was enough to satisfy willful blindness.

2 Where you have a general situation of a company that
3 does not take an action to investigate another company's
4 Sun patent -- patent portfolio, that certainly doesn't satisfy
5 willful blindness. Especially in a case like this where you
6 know that Sun has claimed and Oracle has claimed thousands of
7 patents that potentially cover Java. That is not the kind of
8 scienter and deliberate act not to learn of a specific patent.

9 And in this case, your Honor, it is undisputed from
10 Ms. Catz, who testified in the first phase, from the documents
11 at issue in this case, from the documents that were submitted
12 in evidence during Ms. Catz's testimony that Sun and Oracle
13 didn't talk patents. They didn't -- and Mr. Cizek's testimony
14 who testified that he participated in the negotiations with
15 Mr. Rubin before and after Android was acquired by Google, he
16 testified, no, I didn't talk about patents with Mr. Rubin.
17 That wasn't the subject.

18 And, in fact, it wasn't until Mr. Eustace of Google
19 sent an email to Ms. Catz in the summer of 2010, just before
20 this lawsuit was filed, where he said: We're not going to pay
21 for IP we're not using and for IP you refuse to disclose to us.

22 Sun and Oracle made a decision not to disclose
23 whatever patents they claimed supposedly covered Android. And
24 under that scenario, they certainly can't suggest to a jury
25 that Google had an affirmative duty to go out and investigate

1 potentially thousands of patents to try to figure out if maybe
2 Sun might one day claim that that covered their particular
3 product.

4 That would be putting on Google an affirmative duty
5 to investigate a patent portfolio that the law does not support
6 and none of the cases cited by Oracle support the notion
7 there's such an affirmative duty.

8 **THE COURT:** All right. Let's hear from Mr. Jacobs.

9 **MS. ANDERSON:** Thank you, your Honor.

10 **MR. JACOBS:** We assembled in our opposition to this
11 motion much of the evidence that we will be relying on to show
12 that, in fact, Google was willfully blind to patent risks.

13 There are a series of emails in which patents are
14 explicitly discussed. Rubin writes in one email from 2006,
15 "Sun threatened to sue us over patent violations so we walked
16 away from the negotiations."

17 There is ample evidence of awareness and concern over
18 patents at Google, and ample evidence, undisputed evidence that
19 Java, the Java ecosystem, was the target of the Android
20 development effort; that components of Java are adopted in
21 Android.

22 This is not -- Google would paint this issue as
23 kind of a laboratory, a pristine case in which Company A and
24 Company B are remote. They have no contact. They have no
25 interactions. Company B isn't targeting Company A's products

1 or market, and Company B is sued for patent infringement and
2 says, "Well, we didn't know about your patents."

3 Well, but that's not this case. This is a case of
4 intense interactions between the two companies, a commercial
5 strategy of Google that targets a particular -- a particular
6 product of Sun. Relies on components of that product for its
7 own product, including the Java Language Compiler, which sets
8 up the need for these technologies, adopts a virtual machine
9 architecture that is very similar to the Java virtual machine
10 architecture, and then deliberately, according to Mr. Rubin,
11 made no effort to find out whether Sun was protected by patents
12 as against what Google was doing.

13 Now, Google's argument is, Well, Sun had many
14 patents, so how could we have possibly searched and analyzed?
15 Well, that gets the -- that gets the whole analysis backwards.
16 That demonstrates that Google was aware of the extensivity of
17 Sun's patent protection and nonetheless decided not to identify
18 whether there are patents -- whether any of those patents were
19 likely to be infringed by Google through the course of Android
20 development.

21 It shouldn't be the case that someone escapes willful
22 blindness liability because the right-holder has lots of
23 intellectual property protection. To the contrary, that should
24 up the ante on the defendant to go through those patents and
25 decide and make an affirmative decision.

1 Now, part of what's going on here, of course, is that
2 Google has asserted the attorney-client privilege over all of
3 its legal analysis of these patents. So we're left with Mr.
4 Rubin's non-privileged testimony and the non-privileged record
5 here. But the non-privileged record on the Google side is a
6 record that supports willful blindness. And to rule out
7 willful blindness as a basis for Oracle establishing intent,
8 we're back again to a summary judgment or judgment as a matter
9 of law standard, and the cases just don't support that.

10 Apeldyn is not this case for the reason I cited.
11 It's not the A and B who never had any contact or no
12 significant commercial targeting by B of A. This case really
13 is like *Global-Tech* in which copying occurred and in which the
14 defendant avoided giving counsel the information that counsel
15 would have needed to evaluate the patent risk.

16 So I think we should be allowed to put on our willful
17 blindness case. As of, I believe, it's July 20th, 2010
18 parentheses, before the Lindholm email, close parentheses,
19 Google is on notice of the '104 and '520 patents specifically.
20 They turn out they are the first two patents in the
21 presentation.

22 So when Mr. Lindholm writes his email, it is
23 specifically after the '104 patent has been communicated to
24 Google as a patent that Oracle believes Google is violating.

25 So as of July 20th, we have specific notice, but we

1 have an intent standard to meet here and we think we need to
2 meet it on the basis of all the facts and circumstances.

3 Of course, nobody ever admits on the stand, "I
4 intended to cause somebody else to infringe." It's got to be
5 circumstantial evidence and that's why we have to be able to
6 put on this record of intense interaction, of negotiation, of
7 worry about patents, of failure to investigate, and then, of
8 course, putting Android out there for the OEMs to install on
9 their phones having been willful blindness to the patent risks.

10 If Google would stipulate to indirect infringement, a
11 lot of this goes away. They're actually are going in the other
12 direction. You will recall the other day that the charts are
13 no longer deemed admission as to indirect infringement. They
14 want us to have to prove that each element of the patents is on
15 the phones.

16 **MS. ANDERSON:** Thank you, your Honor.

17 With regard to the evidence that Mr. Jacobs described
18 to support its opposition to this motion, all of that evidence
19 is beside the point of the testimony that we're seeking to
20 exclude here.

21 The testimony that we're talking about in this
22 motion, specifically questions asking Mr. Rubin or Google what
23 did it do to investigate the extent of Sun's patent portfolio.
24 That's a different question and a lot of what Mr. Jacobs cited
25 to.

1 Clearly, there is in the record already from Phase 1
2 the fact that during these early negotiations between Sun and
3 Google, there were discussions about whether or not there would
4 be a co-development and a partnership and a cross licensing.
5 And, clearly, in these documents there is a reflecting of a
6 respect for the fact that there would need to be licenses were
7 we to take proprietary technology from Sun as part of a
8 co-development partnership.

9 That's not the issue in this motion. The issue in
10 this motion is: Can Oracle put before the jury questions
11 designed to ask whether or not -- the extent to which Google
12 had an investigation into the scope of Sun's patent portfolio.
13 That asks the jury to infer that there was a duty to go out,
14 hunt up the thousands of Sun Java patents and figure out if any
15 of them might affect Android. There is no such legal duty.
16 And putting that evidence before the jury will suggest to them
17 that there is and that could be sufficient for willful
18 blindness and it is not.

19 With respect to the point that was made about the
20 '104 patent, Mr. Jacobs stated his intention to try to tie up
21 the Lindholm email with the disclosure in July of 2010 for the
22 first time when Oracle told Google that it thought that the
23 '104 patent was infringed. However, there are declarations
24 before this Court where Mr. Lindholm made clear several times
25 that he had never engaged in a patent infringement analysis

1 with respect to the Android platform ever with regard to any
2 patent. So that would be highly misleading, if that is the
3 point that is intended by Oracle's motion.

4 And that was a question that your Honor upheld
5 Oracle's objection to during Phase 1, but that would -- if they
6 were seeking to do that again, that would again become a big
7 problem in terms of misleading the jury.

8 **THE COURT:** Thank you.

9 **MS. ANDERSON:** Thank you, your Honor.

10 **THE COURT:** All right. Here is the ruling.

11 This motion is denied. The reason is it may be true
12 that this item of testimony from Mr. Rubin will not in and of
13 itself prove what is needed to prove willfulness. But the
14 party with the burden of proof has to proceed one step at a
15 time and to put forth a body of evidence. It's not a proper
16 objection to a single item of that body of evidence to say it
17 alone is not enough.

18 And, yes, I agree that one item of testimony alone is
19 not enough to carry the burden that Oracle has in this case as
20 to willfulness, but that in combination with the rest of the
21 evidence might be.

22 This is an easy problem to solve because I'm going to
23 tell the jury what the correct standard is at the end. If the
24 evidence doesn't measure up, the jury will toss out that claim
25 by Oracle.

1 So Oracle will be allowed to use the Andy Rubin
2 testimony. That motion is denied.

3 Now we go to the motion to exclude Peter Kessler.
4 Let's hear about that one.

5 **MR. KAMBER:** Good morning, your Honor. Matthias
6 Kamber for Google.

7 The motion to deny Peter Kessler is actually pretty
8 straightforward. The issue has been narrowed at this point as
9 well. We've moved on the alleged use of the '104 patent in
10 Android as well as the modifications to the Android code.

11 Dr. Peters, Oracle's counsel, has let us know that
12 they do not intend to present evidence regarding alleged use of
13 the '104 patent by Android through Dr. Kessler, just the
14 modifications to the code.

15 But they don't address the crux of the motion which
16 we filed, which is that Mr. Vandette was the person that Oracle
17 disclosed to testify about, quote, the steps he took to turn
18 off the patented features to measure the performance hits to
19 Android, end quote. That was from the Rule 26(a)(2)(C)
20 disclosure of last year at the end of July. I believe it was
21 July 29th of 2011.

22 They didn't disclose Dr. Kessler for this purpose,
23 which begs the question: Why do they need to do this through
24 Dr. Kessler instead of Mr. Vandette, who they also have on
25 their witness list?

1 **THE COURT:** How do you spell Vandette?

2 **MR. KAMBER:** Excuse me?

3 **THE COURT:** Vandette, how do you spell that?

4 **MR. KAMBER:** V-A-N-D-E-T-T-E.

5 **THE COURT:** All right. Thank you.

6 Go ahead.

7 **MR. KAMBER:** And the answer turned out to be that
8 Mr. Vandette did not do the code modifications either. We know
9 from a declaration from another Oracle employee, Mr. Birger,
10 that he did the modifications. We know that he submitted a
11 declaration in connection with the report, one of the reports
12 submitted by Dr. Cockburn.

13 I think the reason we're having this fight is Oracle
14 has a foundation problem. They sort of have this sort of
15 classic employee spoon feeding problem here where Mr. Vandette
16 didn't do the code modifications. Somebody else did. It
17 wasn't Mr. Kessler -- Dr. Kessler, excuse me -- but they want
18 to put those code modifications in through Dr. Kessler despite
19 having never disclosed him as an expert on those topics.

20 Now, the one other thing --

21 **THE COURT:** Let's be clear. He works for the
22 company, right?

23 **MR. KAMBER:** Correct. All of these guys do.

24 **THE COURT:** So Rule 26 only requires that he be
25 listed as someone who is going to be giving expert testimony.

1 He doesn't have to do a report.

2 **MR. KAMBER:** Correct.

3 **THE COURT:** Only retained people have to do reports.

4 **MR. KAMBER:** Correct.

5 **THE COURT:** Isn't that the end of the story? Let
6 me -- let me just stop right there.

7 He wasn't closed. Who is going to argue this? Mr.
8 Norton? He wasn't disclosed. Why are you trying to bring in
9 Kessler when you didn't disclose him under Rule 26?

10 **MR. NORTON:** We're going to rely on Mr. Vandette for
11 the modifications that were in the code that went to the
12 performance testing for the '104.

13 Mr. Kamber is mistaken when he says that Mr. Birger
14 did the changes. This was already briefed by Google in its
15 motion in limine No. 2 that they filed last October. And we
16 explained why they were mistaken and, yet, they persist in
17 claiming, contrary to the record, that Mr. Birger made the
18 changes and not Mr. Vandette.

19 However, Mr. Kessler was involved in the discussions
20 with Dr. Mitchell and Mr. Vandette about the changes to the
21 codes for the performance testing. And to the extent that
22 Google now wants to raise some sort of foundational challenge,
23 we're entitled to bring Mr. Kessler on, not as an expert
24 witness, but simply as a fact witness to say, "I observed
25 those changes and saw how they were made." That's not expert

1 witness testimony. It's percipient witness testified.

2 **THE COURT:** You said earlier that would be Vandette.

3 **MR. JACOBS:** Mr. Vandette will do it. Apparently,
4 Google wants to challenge Mr. Vandette and claim that he lied
5 at his deposition and in his report when he said that he made
6 the changes to the code and explains what he did. They want to
7 say another employee, Mr. Birger, made the changes.

8 So long as they are making that argument, let me just
9 explain. Mr. Vandette did performance testing. He made
10 modifications to the code for the '104, to test the performance
11 of the '104, and he gave a report. He showed the code that he
12 had used. He disclosed everything he had done. He sat for
13 deposition.

14 Subsequent to that, Mr. Birger took the work that
15 Mr. Vandette had done and repeated that work, but actually
16 loaded it onto an Android phone and provided that phone to
17 Professor Cockburn so Professor Cockburn could do additional
18 work in connection with Dr. Shugan and the conjoint analysis.

19 For some reason Google insists on saying that the
20 fact that Mr. Birger subsequently that code of Mr. Vandette's
21 to do additional work somehow proves that Mr. Vandette never
22 did anything. And so they want to make this argument. They
23 disclosed Mr. Birger's report to cross examine Mr. Vandette and
24 they want to make that argument that somehow there's a chain of
25 custody or foundation issue.

1 If they want to make that argument, then we reserve
2 the right to call Mr. Kessler -- Dr. Kessler I should say --
3 just to show the foundational point. That's the only reason we
4 have him on the list still.

5 Google disclosed Dr. Kessler on its witness list to
6 testify about performance testing of the '104. So, they
7 disclosed him for that purpose and under both parties'
8 interpretation of your Honor's rules, we're entitled to call
9 the witnesses on the other party's list for that disclosure.

10 **THE COURT:** Read that part of my rule to me.

11 **MR. NORTON:** I would have to find it. I should say
12 both parties have -- on their witness lists have said: In
13 addition to the parties named, we reserve the right to call the
14 people on your list. So --

15 **THE COURT:** Well, that's not my -- that's not my
16 rule. That's just --

17 **MR. JACOBS:** I --

18 **THE COURT:** That's each side's own say-so. But tell
19 me what my rule says.

20 **MR. NORTON:** I don't have that in front of me. I
21 said that's our interpretation of your rules and it may be a
22 loose one.

23 We don't need to ask Mr. Kessler about the
24 performance testing. We don't need to rely on Google's
25 disclosure and we don't.

1 Mr. Kessler is just on our witness list to the extent
2 that they persist in making this foundational argument. He
3 would be testifying as a percipient witness, not an expert one,
4 and doesn't require any additional disclosure.

5 **THE COURT:** Vandette is a no foundation witness for
6 who?

7 **MR. NORTON:** For Dr. Mitchell. This came up on
8 Friday. I believe it was Friday. There are engineers who did
9 performance testing, that's Mr. Vandette than Mr. Poore,
10 P-O-O-R-E. And those two witnesses did performance testing
11 that Dr. Mitchell relies upon, in part, in his own report.

12 And so I understand from the discussion last week
13 that we need to put on those engineers and establish what they
14 did before Dr. Mitchell will be allowed to testify to it, and
15 that's what we intend to do.

16 **MR. KAMBER:** Your Honor, let me just briefly address
17 two points.

18 First is just this issue about, Oh, we're just going
19 to use Mr. Kessler as a fact witness. It's not a fact witness
20 about something that he's done during the course of his duties
21 in working at Sun or Oracle or virtual machines or anything
22 along those lines. The duties that we're talking about here,
23 the facts that we're talking about here are his analysis of
24 Android code.

25 So you could just as easily say, well, Dr. Mitchell

1 or Dr. Astrachan were fact witness to the extent that they're
2 talking about their analysis. I think that's -- that's not
3 really a correct -- or accurate portrayal of what Mr. Kessler
4 did in this situation.

5 They disclosed somebody else. They disclosed
6 Mr. Vandette about modifications to the code.

7 **THE COURT:** They are going to call Vandette.

8 **MR. KAMBER:** Excuse me?

9 **THE COURT:** They say they will call Vandette.

10 **MR. KAMBER:** And I think they should and could try to
11 get the information in through there.

12 The other issue I do want to address briefly, though,
13 counsel's suggestion that we're misrepresenting the record as
14 to the foundational problem with Mr. Vandette. Mr. Vandette's
15 report says "Modifications" -- this is Paragraph 29 of
16 Mr. Vandette's report:

17 "Modifications were made to the source in the
18 copies to implement the experiments."

19 He didn't say he did it. He just said,
20 "Modifications were made." It's one of those famous
21 statements.

22 And what's interesting is that Mr. Birger's report at
23 Paragraph 5 says:

24 "I discussed the steps I took to create
25 software builds that represent images of the

1 Android VM that selectively disabled the
2 patents at issue below. It is my
3 understanding that performance benchmark
4 testing was conducted on these images."

5 In other words, Mr. Birger did the changes and
6 Mr. Vandette ran his performance tests on those changes that
7 were made, not that he made.

8 **THE COURT:** Well, is Birger listed as a witness?

9 **MR. KAMBER:** He is not. They refused to provide him
10 for a deposition during discovery.

11 **THE COURT:** Did I rule on that?

12 **MR. KAMBER:** We didn't bring it to your Honor's
13 attention. They said that he wouldn't be -- they agreed that
14 he would not testify at trial and so we just left the issue
15 alone because we didn't think we needed his testimony if he
16 wasn't going to be here in court.

17 **THE COURT:** Well, all right. Anything more anyone
18 wants to say on this subject?

19 **MR. KAMBER:** No, your Honor.

20 **MR. NORTON:** Just two points, your Honor.

21 We do not intend to call Dr. Kessler to do any
22 analysis. Again, the only thing we would intend to call him
23 for would be the foundational point to the extent that Google
24 pursues this in its examination of Mr. Vandette.

25 **THE COURT:** Did Birger do the changes?

1 **MR. NORTON:** No. Mr. Birger was disclosed --

2 **THE COURT:** He read to me what was -- it said he made
3 some exchanges.

4 **MR. NORTON:** No. What he read to you was Mr.
5 Birger's report submitted after Mr. Vandette had done his work.

6 And so Mr. Birger did builds. He created images that
7 were then loaded onto phones by yet another person, Mr. Kenny.
8 That was work that we did. After the performance testing had
9 been done, we decided it would be really useful to have actual
10 phones that we could observe in addition to the benchmark
11 tests, and we enlisted Mr. Birger to do that work and Mr.
12 Birger described everything he had done in his report.

13 Because Mr. Birger's name also appears in the
14 discussions of what Mr. Vandette had done previously, Google
15 has become confused and Google's confusion is that they think
16 Mr. Birger did the original work that Mr. Vandette described in
17 his report. And, you know --

18 **THE COURT:** Does Dr. Mitchell -- is that it? Does
19 Dr. Mitchell in any way rely upon what Birger did?

20 **MR. NORTON:** No, he does not. That was, again,
21 Professor Cockburn using that as, again, the -- once this is
22 loaded on the phones, observing the degradation and performance
23 and using that to assess its effect on consumer demand, but
24 it's not relied on by purchase.

25 **THE COURT:** How about Dr. Cockburn? Does Cockburn

1 rely upon Birger?

2 **MR. NORTON:** Yes. Mr. Birger's report says it is
3 covered. It is a report prepared for the damages expert.
4 That's the purpose of it. That's a Phase 3 issue.

5 **THE COURT:** How come you wouldn't produce Birger for
6 deposition then?

7 We did not believe it was necessary because we
8 thought that the evidence that we had was sufficient for
9 Professor Cockburn and Dr. Camargo to rely on. And Dr. Camargo
10 is an additional -- is a performance testing expert. We
11 submitted his report as well. But they relied on what Mr.
12 Birger had done, which was a fairly straightforward task of
13 loading these images?

14 But the colloquy between the Court and Mr. Kamber was
15 almost verbatim the colloquy between the Court and Mr. Purcell
16 back in December when the Court ruled on Google's motion in
17 limine No. 2. And in that motion Google had also argued that
18 the performance testing by Mr. Vandette was, in fact, done by a
19 different witness, Mr. Birger, whom they had not deposed and
20 that --

21 **THE COURT:** But that's because you won't let them
22 depose him.

23 **MR. NORTON:** And the Court asked, "Did you move?"
24 And Mr. Purcell answered, "No, we did not."

25 And the Court asked, "Was there any reason why you

1 couldn't?" And Mr. Purcell answered, "No, there was not." And
2 that was the end of the matter and motion in limine No. 2 was
3 denied.

4 But none of this needs to be decided today, frankly,
5 your Honor, because Mr. Birger -- Dr. Mitchell doesn't rely on
6 Mr. Birger. Mr. Vandette doesn't rely on Mr. Birger. If there
7 is any foundational question that's raised in the course of
8 Mr. Vandette's testimony or Dr. Mitchell's testimony, then the
9 Court can rule at that time whether we need to put Mr. Kessler
10 on or have the right to put Mr. Kessler on to address that
11 issue.

12 But the Birger issue is going to go away because they
13 are just mistaken. But your Honor has reminded me in clear
14 words before that my opinion about what the evidence will show
15 is trumped by what the evidence shows.

16 The witnesses are going to testify. Mr. Vandette is
17 going to testify. And this Birger issue is going to go away.
18 It's not an issue.

19 And I think the Kessler issue is going to go away.
20 But so long as they continue to make these arguments,
21 Mr. Kessler is on our witness list and he can testify to things
22 he observed, not analysis. And that's the purpose for putting
23 him on the list.

24 I don't think that -- the issues presented by
25 Google's motion are not the issues presented by Dr. Kessler's

1 testimony.

2 **THE COURT:** Is Birger an employee of Oracle?

3 **MR. NORTON:** He is.

4 **THE COURT:** All right. Here is the answer. On
5 Kessler we're going to wait on a ruling until we hear how
6 Vandette comes out, and then the scales will fall from my eyes
7 and I will see how much we need or don't need Kessler and
8 whether or not there should be Rule 37(c) sanction preclusion
9 on account of failure to have disclosed him.

10 Now, with respect to Birger, I'm going to just order
11 this, even though I know this is not part of the motion. I
12 want him to be made available for a half-day deposition by
13 Thursday of this week, because I don't want there to be
14 unfairness when Cockburn comes in to testify.

15 What's wrong with that?

16 **MR. NORTON:** Mr. Birger lives and works in Israel.

17 **THE COURT:** Really?

18 **MR. NORTON:** An Oracle employee, but he lives and
19 works in Israel. And so I understand the Court's order, but
20 Thursday may be very challenging.

21 Your Honor, he is not on our --

22 **THE COURT:** How did he even get involved in this case
23 if he is in Israel?

24 **MR. NORTON:** He is an engineer who had the expertise
25 that we needed. You will recall, your Honor, that we had a

1 very short amount of time in which to produce the second
2 damages report and we enlisted the resources that we had within
3 the company to do the work that would assist Dr. Shugan. And
4 this was important to Dr. Shugan and Dr. Camargo and so we --

5 **THE COURT:** I will give you a little bit more time,
6 but you all know -- I'm not going to get into the way I
7 practiced law whenever I was practicing, but I had noticed that
8 these days on both sides and, also, in other litigation the
9 lawyers cannot help themselves. They want to spoon feed every
10 single expert with handcrafted information done in -- not
11 independently, but done within each company so that the company
12 has total control over what goes to the expert. Then that's
13 held out as fact, as opposed to something that's carefully
14 crafted. I think that it is -- this spoonfeeding of experts is
15 a bad trend. I don't like it. And both of you have done it.
16 So, you know, there we are.

17 But you have got to bring Mr. Birger back in time for
18 him to be deposed sufficiently before Cockburn testifies. Now
19 that's in Phase 3. That's several days away, maybe even a
20 couple three weeks away, but he ought to be over here. Say,
21 you get Mr. Birger over here by next weekend and that he stands
22 for a deposition, half-day deposition.

23 Now, if you over there on the Google side don't want
24 that, then that's fine, but be aware that when the time comes
25 if there is a parallel situation, I will, time permitting,

1 require you to do the same thing on the Google side.

2 So do you want -- do you want him to come or not?

3 **MR. KAMBER:** Your Honor, I think we would want Mr.
4 Birger to come.

5 **THE COURT:** You think you would. That is an iffy
6 thing. Do you want him or not? "Yes" or "no."

7 **MR. KAMBER:** We do want him. And the one thing I
8 would add is I would like to be able to test whether or not Mr.
9 Birger did these changes instead of Mr. Vandette. And so it's
10 something that --

11 **THE COURT:** I'm not -- no, no. You're talking
12 yourself out of it. They're going to go forward with
13 Mr. Vandette right away. He will be the first witness, as far
14 as I'm concerned, in Phase Two.

15 I'm looking ahead to Phase Three. So you are going
16 to talk me out of even letting you have that opportunity. Do
17 you want him for Phase Three?

18 **MR. KAMBER:** Yes.

19 **THE COURT:** All right. Then I'm going to require
20 Mr. Birger to be here by this coming weekend, and be deposed by
21 Monday or Tuesday of next week. All right. So that's the
22 ruling on that motion.

23 Now, we go to -- there's one to exclude something
24 called the CTS -- exclude evidence regarding Android
25 compatibility suite.

1 **MR. VAN NEST:** That's right, Your Honor.

2 Mr. Weingaertner is going to handle that.

3 **THE COURT:** Let me hear about that one.

4 **MR. WEINGAERTNER:** Good morning, Your Honor. Scott
5 Weingaertner for Google.

6 **THE COURT:** Welcome back.

7 **MR. WEINGAERTNER:** What Oracle hopes to do is to
8 overcome a failure to prove its indirect infringement case by
9 relying on a Compatibility Test Suite to draw inferences about
10 infringement.

11 Oracle took almost no discovery, or very little
12 discovery, on what was on actual handsets out there. A little
13 bit from Motorola. And now what they're hoping to do is have
14 this Compatibility Test Suite somehow create an impression in
15 the jury's mind that this tests for anything to do with
16 infringement.

17 The problem, though, is that the compatibility
18 testing tests for compatibility of applications that run. It's
19 a black box test. You don't find out what's happening inside
20 the black box.

21 Just like a bathroom scale can't distinguish between
22 the types of diets a person might be on and their kind of
23 exercise, the Compatibility Test Suite doesn't tell you what's
24 going on. Doesn't tell you what the innards do.

25 So with respect to the '104 Patent, Oracle is trying

1 to say that some kind of speed tests will permit an inference
2 that the patented technology is used. But by that logic, the
3 CTS would be probative of infringement of any
4 performance-related patent.

5 Speed is a function of all different kinds of things,
6 including processors, which are not at issue in this case. The
7 jury will probably mistake that.

8 With respect to the '520 Patent, Oracle makes a
9 curious argument. The '520 Patent is directed at development
10 kit, not the actual virtual machine. Their argument is that
11 somehow the Compatibility Test Suite reveals the presence of
12 one of the claim limitations.

13 And Your Honor's color charts actually have come in
14 handy, as Your Honor said at the beginning of the case, because
15 the element they are pointing to is just the presence of an
16 array. It's not even a disputed element. The issue in that
17 patent is how you create it, which is done on the development
18 suite. So that is a complete red herring.

19 So the problem here is that the jury is very likely
20 to think that the Compatibility Test Suite is somehow probative
21 of the presence -- as they've indicated in their brief, of the
22 presence of specific detailed functionality that the claims go
23 to, and just isn't the case.

24 We believe it's going to be prejudicial for the jury
25 to hear that testimony, Your Honor.

1 **THE COURT:** All right.

2 **MR. JACOBS:** Google's theory on this leg of the
3 indirect infringement analysis is that, notwithstanding the
4 fact that Android is posted on a public website or made
5 available to OEMs by contract, notwithstanding that Android is
6 then activated and Google finds out about Android activations,
7 notwithstanding that the contracts impose requirements that
8 Android meet various standards, including performance
9 standards, and notwithstanding the fact that one of those
10 requirements is that the Android devices that are going to be
11 activated as Android devices and eligible to download
12 applications from the app store, Google should in no way be
13 responsible for -- in both a legal sense and in a factual
14 sense, for the content of what is on the phones of the OEMs for
15 the phones that are in dispute in this phase.

16 We are going to rely on a mix of direct evidence,
17 testing evidence, and circumstantial evidence to rebut that
18 argument.

19 It's an argument that is -- we're going to be proving
20 the stunningly obvious, that Android is Android, and that
21 there's no reason any OEM would alter the functioning that's
22 embodied by the '104 Patent or the '520 Patent.

23 And part of the proof is going to be Google's
24 requirements, which include requirements that you meet
25 performance standards, and the performance testing and

1 performance admissions by Google's own engineers, the
2 performance sales pitch that Google's engineers have made about
3 the very functionality that's in dispute.

4 The jury should be entitled to hear, again, that mix
5 of evidence, that body of evidence, to conclude that Google's
6 attempts to run away from the fact that it posts Android for
7 this very purpose: that OEMs will implement Android without
8 change to the innards, to the internals, so that Android will
9 perform well, so that users will have a satisfactory
10 application experience.

11 The jury should be entitled to hear that body of
12 evidence, including the CTS and its requirements, one of which
13 is specifically directed to the '520 Patent -- it's an issue of
14 proof; we'll have to prove it, but it is one of the
15 requirements of the CTS -- before deciding whether or not
16 Google has indirectly infringed.

17 So this is yet another effort by Google to pull out
18 one little piece of evidence that's part of the mix of evidence
19 that goes to our proof of indirect infringement.

20 **MR. WEINGAERTNER:** Your Honor, Oracle's counsel might
21 have had a point if the CTS had anything to do with what's in
22 the claims. It simply doesn't.

23 They can put up testimony about whether Google wanted
24 people out there in the world to use the same code or not.
25 We're not arguing about that.

1 What counsel said just now -- and I'm going to refer
2 to the color claim chart, if I can find the one for the '520.
3 Again, they're pointing to what is not in dispute. It's this.
4 And it's Claim 18.

5 Your Honor doesn't have this in front of you yet, but
6 it has to do -- I'm sorry, I don't have the right one in front
7 of me -- has to do with simply the presence of an array.

8 And that's not what the claim is about. The part
9 that -- of course, any computer has an array. That's not in
10 dispute. The issue is how you make it. Has to do with whether
11 you simulate or whether you do pattern matching. And Your
12 Honor will hear lots about that. That happens on the
13 development kit.

14 So the fact that counsel has now just said that he's
15 somehow making proof of the presence of infringement claims is
16 the very danger we're concerned about.

17 Even Dr. Mitchell, even he hasn't said that the
18 Compatibility Test Suite is probative of anything to do with
19 infringement at all.

20 So we're not saying that they can't talk about or put
21 people up and talk about how, you know, there's an interest in
22 having people use Android code, whether it's modified or not.

23 It's this Compatibility Test Suite that's the danger
24 because it's going to be misunderstood as somehow being
25 probative, and Mr. Jacobs just said, of the presence of claim

1 elements, which is simply not true. Certainly not disputed
2 claim elements.

3 **THE COURT:** Mr. Jacobs, what do you say to the point
4 that you said it checks for the '520, but counsel is saying it
5 doesn't check for the '520, it just checks for the array, and
6 the array is not the entire claim.

7 **MR. JACOBS:** It isn't the entire claim, Your Honor.
8 It is the last step of the claim, which is the performing the
9 static initialization step. But you've got to get there.

10 And so this is part of the -- part of the body of
11 evidence we will rely on to show that Google knows very well
12 and, in fact, imposes requirements on its OEMs that limit their
13 flexibility.

14 I should step back a little bit. When I introduced
15 the issue, I left out a step in Google's logic.

16 Google's logic is: We put Android out there. We put
17 it out there under the Apache license. Anybody can modify to
18 their heart's content. We don't know what is on the OEM
19 phones, and we have no knowledge of any changes; therefore, we
20 cannot be liable for incorrect infringement.

21 What this body of evidence shows is the tight web of
22 interrelationship between Google and its handset makers; that
23 the handset makers that adopt Android and put Android on the
24 phone so that it can take advantage of the Android ecosystem
25 and Google are interrelated.

1 We will put on evidence through the person who runs
2 the compatibility testing program that he inspects phones and
3 that he has never seen changes in this area. The CTS is part
4 of his work, part of his responsibility.

5 I think we have a factual dispute about the
6 significance of the CTS. I think it's yet another case where
7 the proof will be in the testimony, the proof will be in the
8 documents. And we will make our showing that the CTS is
9 relevant to what's on the handsets, even as to these
10 performance-related features.

11 **THE COURT:** Let me ask defense counsel, isn't that
12 correct, that the claim chart with the color coding only goes
13 to the Android as it exists at Google? It does not go to what
14 Motorola and someone else would be doing.

15 So even if it only proves up one element or one
16 limitation of the '520, it does tend to show that that element
17 resides in the handsets. A point that you won't concede.

18 So why shouldn't counsel be allowed to use it for
19 that purpose?

20 **MR. WEINGAERTNER:** Well, Your Honor, nobody has ever
21 disputed that there's an array on handset. It's just not even
22 in dispute.

23 **THE COURT:** You haven't --

24 **MR. WEINGAERTNER:** No.

25 **THE COURT:** That's another thing I've learned. "No

1 one ever having disputed" does not no equal "stipulated."

2 **MR. WEINGAERTNER:** I think we would have to check
3 with counsel, but I think we would possibly stipulate that
4 there is an array on handset.

5 **THE COURT:** Not good enough. Motion is denied.
6 Motion is denied --

7 **MR. WEINGAERTNER:** Thank you, Your Honor.

8 **THE COURT:** -- for the reason that, this not
9 prejudicial testimony, it is not strong testimony, but it is
10 one step in a long chain of evidence. And plaintiff has the
11 burden of proof. They've got to do it one step at a time.
12 This proves at least a tiny little piece of their overall case.
13 It hasn't been stipulated to. I'm going to let it in. So this
14 motion is denied.

15 All right. So we are now out of motions in limine.
16 I guess it's close to time for a short break, but is there
17 anything else -- can I ask you a question?

18 What is the difference between ecosystem and a
19 platform? You keep using the word "ecosystem." We're getting
20 into higher and higher platitudes.

21 (Laughter)

22 **THE COURT:** What is the ecosystem and what is the
23 platform? Or do you really just mean the same thing?

24 **MR. JACOBS:** As the word tumbled out, Your Honor, I
25 thought to myself, we're getting into higher and higher

1 platitudes. I'll try not to use it.

2 **THE COURT:** Pretty soon this will be the Clean Water
3 Act case.

4 (Laughter)

5 **MR. JACOBS:** The platform defines the environ- --
6 it's going to sound like an abstraction again.

7 The platform defines the programming environment.
8 The programmers program to that programming environment and
9 become -- they and their applications become part of an
10 ecosystem built around the platform.

11 So in the case of the iPhone, we have an iPhone
12 ecosystem defined by the iPhone in its IOS operating system and
13 programmers who create applications for the iPhone.

14 In the case of Android, we have the Android platform
15 and the Android programmers who program to the Android
16 platform. They created an Android ecosystem.

17 In Java, we have the Java platform and all the
18 millions of Java programmers who write to that platform and
19 who -- and the applications and other associated businesses
20 around that platform.

21 **THE COURT:** All right. Anything else I can do for
22 you before we -- you know, you need to be prepared -- as soon
23 as we get the verdict, we'll have a short break. We'll set up.
24 We'll go forward with our opening statements.

25 **MR. JACOBS:** We have some exhibits we've stipulated

1 to, we could move into evidence right after the break, Your
2 Honor. We'll get set up.

3 **THE COURT:** Yes, sir.

4 **MR. VAN NEST:** Your Honor, I have a couple of
5 objections to their opening statement.

6 **THE COURT:** All right.

7 **MR. VAN NEST:** I probably would benefit from
8 conferring with counsel before we bring this up.

9 **THE COURT:** All right. We'll let you do that. We'll
10 take a 15-minute break.

11 (Recess taken from 9:03 to 9:31 a.m.)

12 **THE COURT:** Okay. Please, be seated.

13 And what issue may I help you with?

14 **MR. VAN NEST:** We had two disputed slides from the
15 plaintiff's opening, Your Honor, which I think most of the
16 disputes were -- have been resolved by Your Honor's rulings.
17 But there is one.

18 If I could show on the screen slide 34 from the
19 plaintiff's opening. Ben has it. I have hard copies here,
20 too, Your Honor.

21 I just assumed this would go out with Your Honor's
22 ruling this morning. This is another Lindholm e-mail. And I
23 understood Your Honor to say that until they linked up
24 Mr. Lindholm to the '104, they wouldn't be waiving e-mails
25 around.

1 This one was briefly testified to in Phase One.
2 Mr. Lindholm said that he wasn't -- he didn't know Mr. Sobota,
3 and wasn't sure what he was talking about. I just assumed this
4 would go out with your ruling.

5 **THE COURT:** I need to see the e-mail. I don't
6 remember this one. So could I have a copy of the e-mail?

7 **MR. VAN NEST:** Yes. Can we have TX 326. Can we put
8 it on the screen. This is a long e-mail that he's on part of.

9 **THE COURT:** Let me ask the plaintiff, what is the
10 part that is relevant?

11 **MR. JACOBS:** The part that's relevant is the part
12 that was highlighted, which I believe is in the -- on the
13 second or third page of the exhibit.

14 So, actually, if we go back to the slide, Your Honor,
15 I'll be able to tie this up.

16 **MR. VAN NEST:** Page 2, it says.

17 **MR. JACOBS:** So this is not -- this is to
18 Mr. Lindholm, not from Mr. Lindholm. And this is a further
19 indication that as Google was developing Android, they were
20 concerned about patent risks relating to Java.

21 **THE COURT:** Who wrote the words "Proposal: Google
22 buys the rights to Java from Sun (patents, copyrights). Good
23 for Google: Our Java lawsuits go away"? Who wrote that?

24 **MR. VAN NEST:** That was written by Mr. Sobota, who
25 Mr. Lindholm said he did not know was part of the Android team.

1 And Mr. Lindholm said he didn't know what he was talking about
2 in this e-mail.

3 **THE COURT:** But it's not the Lindholm e-mail. This
4 is to Mr. Lindholm from somebody else.

5 **MR. VAN NEST:** I'm mistaken. It's not even
6 Mr. Sobota. Someone else wrote it to Mr. Sobota, and that's
7 being passed on here to Mr. Lindholm.

8 **THE COURT:** Who is the someone else?

9 **MR. VAN NEST:** His name is Brett Slatkin. And that's
10 the person that Mr. Lindholm said he didn't know and didn't
11 know what he was talking about.

12 And he's on the chain, Mr. Lindholm is. But, again,
13 until there's something linking Mr. Lindholm up, this wouldn't
14 seem appropriate any more than the Lindholm e-mail itself. He
15 didn't even write this one. This was written by someone to
16 someone else, who passes it on to him.

17 And he's already said in Phase One that he's not sure
18 what they're talking about, and he doesn't know the author.
19 And he wasn't aware of what -- any Java lawsuits pending at
20 Google at that time. This was in 2009.

21 **MR. JACOBS:** At the end of the string, Your Honor,
22 Mr. Schmidt endorses the idea of making this -- looking at this
23 possibility.

24 **MR. VAN NEST:** So all I'm asking, Your Honor, is that
25 this not be referenced in the opening. If they get into it in

1 the testimony and it links up to something, fine. But I don't
2 think it's appropriate for the opening statement.

3 **THE COURT:** Isn't this already in evidence?

4 **MR. JACOBS:** Yes, Your Honor.

5 **MR. VAN NEST:** It is. As is the Lindholm e-mail.

6 **THE COURT:** Yes. Well, I don't see these as quite
7 the same thing. This -- the e-mail on the screen that you want
8 to keep out, I'm not going to keep out because it uses the word
9 "patents" and "our Java lawsuits go away" if you buy the rights
10 to Java.

11 And that's probative to show that somebody --
12 somebody who will not come forward and own up to it, is saying
13 within Google that we're worried about those patents at Sun.
14 And just because Mr. Lindholm now cannot remember anything does
15 not mean that this is not good evidence.

16 I disagree with you, Mr. Van Nest. In fact, you're
17 talking me into letting them use the other e-mail. I'm not
18 going to go back on that. But this is perfectly okay to use in
19 the opening.

20 So that motion is denied.

21 **MR. VAN NEST:** The other one, Your Honor, is 39. If
22 we could display that.

23 **THE COURT:** All right. Let's see it.

24 **MR. VAN NEST:** This is simply more on the subject of
25 how many Android activations there are a day. That may well be

1 relevant to Phase Three. It's not relevant to Phase Two.

2 There's no dispute that Android is being activated
3 and that handsets using the Android platform are being
4 activated. But why we're featuring the amount of activations
5 or the number of activations in this phase I just don't see the
6 relevance of it. If there is any relevance, it's outweighed by
7 the prejudice.

8 **THE COURT:** What is the relevance of this?

9 **MR. JACOBS:** The relevance is highlighted by the
10 heading in the slide, Your Honor, "Google Induces Patent
11 Infringement by Phone Makers."

12 They induce it to the extent of 750,000 per day.
13 They know that because ET phones home and says, I am an Android
14 device. And Google tallies that and benefits from it.

15 And that is why it induces people to use Android.
16 That is why it induces people -- induces OEMs to install
17 Android. And that is why -- and that ties up with the CTS and
18 all the other evidence that Android is Android, the Android
19 that Google puts on its website is the Android that's on the
20 devices, and working very successfully because it performs
21 well. And it performs well on account of the patents that
22 we're asserting in this phases.

23 **MR. VAN NEST:** Your Honor, this doesn't go to any of
24 that, point one. And point two --

25 **THE COURT:** Why doesn't it go to inducement, that

1 there was an incentive that -- that Google had a strong
2 incentive to forge ahead, given the large number of activations
3 every single day, such that it was willing to be -- this is the
4 argument. I'm not saying I agree with it. But the argument is
5 they were willing to look the other way on patents because, in
6 the meantime, they were making so much money off of it.

7 **MR. VAN NEST:** Motivation is not an element, Your
8 Honor, of willful infringement. Number one. And, number two,
9 in Phase Two we're limited to eight phone models. This number
10 is based on all models that are sold, presumably. And in Phase
11 Two we're only talking about eight. Your Honor limited their
12 claim in Phase Two to the eight models for which they disclose
13 infringement contentions.

14 So, the fact that Android is being activated doesn't
15 go to inducement. Inducement requires a showing of awareness
16 of a patent and an intent to infringe it.

17 The fact that Android phones are being activated
18 isn't even tangentially relevant to that. It might be relevant
19 in Phase Three, if they can tie this up to any proof they have
20 that these reflect certain models that are at issue here in
21 Phase Two.

22 So, again, we're talking about all activations, not
23 activations on any particular handset at issue in Phase Two.
24 And it's simply not an element of their proof.

25 **THE COURT:** Well, motivation has -- you know, in a

1 criminal case -- to take a different area of the law --
2 motivation is rarely an element of a crime. But the government
3 is always entitled to prove motive in order to prove
4 circumstantial evidence of the items that are the elements.

5 So I don't think that's a good argument to say that
6 motivation is the -- is the motivation relevant. The
7 motivation has some relevance.

8 The motion is denied, and I'm going to let them use
9 that slide for opening.

10 **MR. VAN NEST:** Thank you, Your Honor.

11 **THE COURT:** You're most welcome.

12 Anything else I can help you with?

13 **MR. JACOBS:** Yes, Your Honor, a couple of
14 housekeeping items.

15 We have some deposition designations for the Court to
16 rule on.

17 **THE COURT:** Please hand them up, and I'll get right
18 to them.

19 **MR. JACOBS:** Great. I'm handing the designations for
20 Mr. Camargo and Mr. Morrill.

21 **THE COURT:** All right.

22 **MR. JACOBS:** And then I have a lengthy list of
23 exhibits that are stipulated to.

24 We are doing a good job, Your Honor, on working
25 together in getting these exhibits in.

1 **THE COURT:** Remember the ones that are already in
2 evidence, you don't have to move them in again.

3 Okay. I'm all ears. Go ahead.

4 **MR. JACOBS:** 32. 46.16. 46.17. 46.18. 46.19.

5 **MR. VAN NEST:** No objection, Your Honor.

6 **THE COURT:** All received.

7 (Trial Exhibits 32, 46.16, 46.17, 46.18, and 46.19
8 received in evidence.)

9 **MR. JACOBS:** 46.102. 46.103. 46.104.

10 **MR. VAN NEST:** No objection.

11 **THE COURT:** Received.

12 (Trial Exhibits 46.102, 46.103, and 46.104 received
13 in evidence.)

14 **MR. JACOBS:** 47.16. 47.17. 47.18. 47.19. 47.20.

15 **MR. VAN NEST:** No objection, Your Honor.

16 **THE COURT:** Received.

17 (Trial Exhibits 47.16, 47.17, 47.18, 47.19, and 47.20
18 received in evidence.)

19 **MR. JACOBS:** 106. 107. 225. 262. 816. 1095.

20 **MR. VAN NEST:** No objection.

21 **THE COURT:** All received.

22 (Trial Exhibits 106, 107, 225, 262, 816, and 1095
23 received in evidence.)

24 **MR. JACOBS:** 46.1. 46.2. 46.3. 46.4. 46.5. 46.6.

25 46.7. 46.8. 46.9.

1 **MR. VAN NEST:** No objection.

2 **THE COURT:** All in.

3 (Trial Exhibits 46.1, 46.2, 46.3, 46.4, 46.5, 46.6,
4 46.7, 46.8, and 46.9 received in evidence.)

5 **MR. JACOBS:** 46.11. 46.12. 46.13. 46.14. 46.15.

6 **MR. VAN NEST:** No objection.

7 **THE COURT:** Received.

8 (Trial Exhibits 46.11, 46.12, 46.13, 46.14, and 46.15
9 received in evidence.)

10 **MR. JACOBS:** 46.29.

11 **MR. VAN NEST:** No objection.

12 **THE COURT:** Received.

13 (Trial Exhibit 46.29 received in evidence.)

14 **MR. JACOBS:** 47.1. 47.2. 47.3. 47.4. 47.5. 47.6.

15 47.7. 47.8. 47.9. 47.10. 47.11. 47.12. 47.13.

16 **MR. VAN NEST:** No, objection.

17 **THE COURT:** Received.

18 (Trial Exhibits 47.1, 47.2, 47.3, 47.4, 47.5, 47.6,
19 47.7, 47.8, 47.9, 47.10, 47.11, 47.12, and 47.13
20 received in evidence.)

21 **MR. JACOBS:** 47.15. 47.21. 47.22.

22 **MR. VAN NEST:** No objection.

23 **THE COURT:** Received.

24 (Trial Exhibits 47.15, 47.21, and 47.22. received in
25 evidence.)

1 **MR. JACOBS:** 48. 57. 105. 112 -- let me start
2 over. 112. 113. 735. 736. 737. 738. 739.

3 **MR. VAN NEST:** No objection.

4 **THE COURT:** All received.

5 (Trial Exhibits 48, 57, 105, 112, 113, 735, 736, 737,
6 738, and 739 received in evidence.)

7 **MR. JACOBS:** 755. 756. 757. 758.

8 **MR. VAN NEST:** No objection.

9 **THE COURT:** All received.

10 (Trial Exhibits 755, 756, 757, and 758 received in
11 evidence.)

12 **MR. JACOBS:** 835.

13 **MR. VAN NEST:** No objection.

14 **MR. JACOBS:** 443, 458, 459.

15 **MR. VAN NEST:** Objection.

16 **THE COURT:** Received in evidence.

17 (Trial Exhibits 835, 443, 458, and 459 received in
18 evidence.)

19 **MR. JACOBS:** 4011. 4013. 4015. 4018. 4021.

20 **MR. VAN NEST:** No objection, Your Honor.

21 **THE COURT:** Wait a minute. 4015. 40 --

22 **MR. JACOBS:** 18.

23 **THE COURT:** And then?

24 **MR. JACOBS:** 4021.

25 **THE COURT:** 4021. All right. All received.

1 (Trial Exhibits 4011, 4013, 4015, 4018, 4021,
2 received in evidence.)

3 **MR. JACOBS:** Thank you, Your Honor.

4 **THE COURT:** Is that it?

5 **MR. JACOBS:** Yes.

6 **THE COURT:** Thank you. Anything more?

7 **MR. PURCELL:** One brief thing, Your Honor. You
8 ordered us to make Mr. Aditya Agarwal available for a
9 deposition this week, which we are going to do.

10 Mr. Rubin's deposition, that took place a couple of
11 weeks ago, was limited to three hours. And I was wondering if
12 we could have that same time limitation for Mr. Agarwal's
13 deposition this week.

14 **THE COURT:** Isn't three hours enough?

15 **MR. BOIES:** Your Honor, three hours will be enough.

16 **THE COURT:** Done.

17 **MR. PURCELL:** Thank you, Your Honor.

18 **THE COURT:** What else?

19 **MR. VAN NEST:** That's all we have, Your Honor.

20 **THE COURT:** Great.

21 Well, I guess we will take a break and wait on the
22 jury. We've received no further notes.

23 When I left the bench a moment ago, they were out on
24 a break. So they, I guess, had been at work and took a break.
25 Now, I'm not sure if they are back. I think they are back in

1 the jury room, at this point. So we'll let you know as soon as
2 we hear anything.

3 We'll be in recess for a while.

4 **MR. VAN NEST:** Thank you, Your Honor.

5 (Proceedings in recess from 9:44 to 10:08 a.m.)

6 **THE COURT:** Be seated. We have a note from
7 Mr. Rutherford, who says:

8 "One of the jurors has indicated that he/she
9 has had conversations regarding this trial
10 (patents/copyrights) over the weekend."

11 All right. Comments. What would you like to do
12 about this?

13 **MR. VAN NEST:** Well, Your Honor, I think we should
14 find out, number one, what's the extent of the conversations.
15 Number two, were they disclosed to other jurors? And, if so,
16 what was disclosed.

17 And I think, obviously, that's something that we'd
18 have to be sort of a step at a time on it. We don't want to
19 have more disclosure now than there's been. If the juror
20 didn't disclose anything to others, that's one thing. But I
21 think a lot would depend on what the conversations were, and
22 how significant they were, and what was the nature of them,
23 which I would ask the Court to determine at the sidebar,
24 probably from the juror involved.

25 And I think we need to find out from our panel

1 whether any of these discussions were actually discussed with
2 them in the jury room, before we make any decision about what
3 we could do.

4 **MR. JACOBS:** I don't see much choice, Your Honor, but
5 to find out whether and how substantial these conversations
6 were.

7 **THE COURT:** Why should this be done at the sidebar?

8 **MR. VAN NEST:** Well, I think it would depend, Your
9 Honor. If we're concerned -- if not much has been disclosed to
10 other jurors, we wouldn't want more to be disclosed to them now
11 about this conversation. That's --

12 **THE COURT:** I'm thinking that we would bring back
13 Mr. Rutherford only, have Dawn tell the other 11 jurors to stop
14 deliberating. Bring back Mr. Rutherford and find out who we're
15 talking about here. And then bring that person in here and
16 find out more.

17 I don't know how many inquiries we will have to make,
18 but I think it ought to be done in open court, unless there's
19 something sensitive about the -- what the juror did.

20 **MR. VAN NEST:** I think that's logical. If you're
21 going to have them one at a time, and the other jurors are not
22 present, that's fine with me.

23 **THE COURT:** Let's bring in Mr. Rutherford.

24 Please tell the other jurors to stop deliberating
25 while Mr. Rutherford is out here.

1 (Juror Ronald Rutherford enters the courtroom.)

2 **THE COURT:** Mr. Rutherford, welcome back. Good
3 morning to you.

4 **JUROR MR. RUTHERFORD:** Good morning.

5 **THE COURT:** Hope you had a good weekend.

6 **JUROR MR. RUTHERFORD:** Yes, sir.

7 **THE COURT:** Please let Mr. Rutherford have the
8 microphone.

9 **THE CLERK:** Yes. I'm just turning it on, Judge.

10 **THE COURT:** So, again, good morning.

11 Mr. Rutherford, we have your note. I'll just read it
12 to make sure you know what it said.

13 "One of the jurors has indicated he/she has
14 had conversations regarding this trial
15 (patents/copyrights) over the weekend."

16 So you must tell me what you're talking about in this
17 note.

18 **JUROR MR. RUTHERFORD:** How much detail -- can I just
19 go into the details of it? Or -- I've never done this before.

20 **THE COURT:** I think I need to know who it was.

21 **JUROR MR. RUTHERFORD:** Yes.

22 **THE COURT:** Who was it?

23 **JUROR MR. RUTHERFORD:** It's Betsy.

24 **THE COURT:** Who?

25 **JUROR MR. RUTHERFORD:** Betsy. I don't know her last

1 name. I apologize.

2 **THE COURT:** Is that Ms. Hostynek?

3 **JUROR MR. RUTHERFORD:** I think --

4 **THE COURT:** Elisabeth?

5 **JUROR MR. RUTHERFORD:** Elisabeth, probably, yes.

6 **THE COURT:** All right. Now, counsel, if you think
7 that I'm inquiring too much, you must stand up and immediately
8 object. Do not sit back and say later that I'm inquiring too
9 much into the deliberative process. So if you object to one of
10 my questions, it's fine to do that. But you must object right
11 away.

12 All right. I'm going to ask you, unless there's an
13 objection, what is it on that very limited subject -- I don't
14 want to get into deliberations, but I need to know what is it
15 that she said about this subject of what happened over the
16 weekend. Go ahead.

17 **JUROR MR. RUTHERFORD:** During the internal questions
18 and answers that we're going through, during one of her answers
19 she gave her answer. And we had indicated that we didn't think
20 that that had answered the question that we had put out there.
21 And she had indicated that it did because her husband has
22 experience in patents and, therefore, was applicable.

23 I don't know if I should keep going. Sorry.

24 And we said no, that's not part of that.

25 **THE COURT:** Pause right there.

1 Again, Counsel, if you think we're getting into
2 something we should not get into, you need to stand up and be
3 heard.

4 Okay. No one. Continue on.

5 **JUROR MR. RUTHERFORD:** So we had said that that
6 didn't have anything to do with what we were discussing. And
7 she said it did because her husband had a lot of experience
8 with patents, and when she was talking with him this weekend
9 that he had indicated that, you know, there's a lot of -- can I
10 go into specifics of what she said?

11 **THE COURT:** All right. Just a moment. It's okay
12 with me, unless there's an objection.

13 **MR. VAN NEST:** I think so long as we don't have
14 revealed what question this is related to, it's fine with
15 continuing.

16 **JUROR MR. RUTHERFORD:** I have a feeling if I keep
17 saying what I'm about to say, that that may become apparent.
18 Sorry. That's why I stopped.

19 **THE COURT:** Is this the only comment that's been made
20 in the jury room, that has to do with this, that would be in
21 violation of the admonition?

22 **JUROR MR. RUTHERFORD:** We then proceeded to talk
23 about we weren't supposed to -- allowed to do that, and several
24 of us have said we're a little uncomfortable that we're having
25 conversations of this nature.

1 And she indicated she now understands what the second
2 part of this trial is going to be about, and she now has more
3 information on that and she can exclude it. And a couple of us
4 have expressed some concern.

5 **THE COURT:** All right. But let me go back to
6 something she said, that her husband had something to do with
7 patents. But what you're discussing in the jury room has to do
8 with copyrights, not patents.

9 **JUROR MR. RUTHERFORD:** Understood.

10 **THE COURT:** All right.

11 **JUROR MR. RUTHERFORD:** It sounds like she's taking
12 what she knows and bringing it over to this question. And some
13 of us have indicated that that's not answering this question.
14 And she's saying that it may to her.

15 **THE COURT:** All right. Have you given me the essence
16 of is it already, or is there more that you can give me without
17 revealing your deliberative process?

18 **JUROR MR. RUTHERFORD:** Uhm, I think that's the
19 essence of it. I think.

20 **THE COURT:** Anything more that the lawyers want me to
21 ask?

22 **MR. JACOBS:** No, Your Honor.

23 **MR. VAN NEST:** The only thing I would ask, Your
24 Honor, is, was there anything else said of substance about
25 whatever it is the juror discussed?

1 **THE COURT:** All right. Can you answer that question.

2 **JUROR MR. RUTHERFORD:** I'm not sure I understood the
3 question. I apologize.

4 **THE COURT:** Please repeat it.

5 **MR. VAN NEST:** With respect to what the juror said to
6 other jurors in the jury room, did she say anything else about
7 her conversation with her husband that you haven't already
8 discussed with us?

9 **JUROR MR. RUTHERFORD:** I don't think so, no.

10 **THE COURT:** Well, let me ask this. Was the point she
11 was trying to make, as you understood it, was that she was
12 disagreeing with one of the instructions of law that I had
13 given the jury?

14 **JUROR MR. RUTHERFORD:** I think that in terms of what
15 we're deliberating, there is distinction in your guidance. And
16 it's one of, you know, this or this, this or this. And it's
17 influencing one side, if not both sides, of an "or."

18 **THE COURT:** You're saying the word "or"; is that it?

19 **JUROR MR. RUTHERFORD:** It's what's on each side of
20 the "or."

21 **THE COURT:** Oh.

22 **JUROR MR. RUTHERFORD:** You know, the sky is either
23 blue or cloudy. And this conversation is sort of -- the
24 conversation she had sounded like it was a validation of the
25 sky was blue.

1 **THE COURT:** All right. Well, I don't understand
2 exactly how that would screw into the instructions, but maybe
3 it's best to keep it at a higher level. I think I understand
4 your general point.

5 Anything more you want me to ask?

6 **MR. JACOBS:** No, Your Honor.

7 **THE COURT:** All right. Mr. Rutherford, Dawn will
8 take you back to the jury room. Please don't deliberate any
9 longer. Just keep everything on hold as if you were in a
10 break. And we will -- Dawn, would you please instruct the
11 entire jury not to deliberate further until I get to the bottom
12 of this. All right?

13 **THE CLERK:** Uh-huh.

14 **THE COURT:** All right. Thank you.

15 Thank you, Mr. Rutherford.

16 **JUROR MR. RUTHERFORD:** Thank you.

17 (Juror exits courtroom.)

18 **THE COURT:** I propose now to bring in Ms. Hostynek.
19 Any objections?

20 **MR. JACOBS:** No, Your Honor.

21 **THE COURT:** John, would you please ask Dawn to bring
22 her in.

23 **THE CLERK:** You can please come to order. You don't
24 have to stand.

25 (Juror Elisabeth Hostynek enters the courtroom.)

1 **THE COURT:** Good morning, Ms. Hostynek. How are you
2 today?

3 **JUROR MS. HOSTYNEK:** I'm fine.

4 **THE COURT:** It has been reported -- you're Betsy; is
5 that right?

6 **JUROR MS. HOSTYNEK:** Yes.

7 **THE COURT:** It has been reported that you have said
8 in deliberations that you consulted with your husband, who is a
9 patent attorney, and made comments about what you learned over
10 the weekend.

11 **JUROR MS. HOSTYNEK:** No. No. No. He's not a patent
12 attorney.

13 He has three patents. And yesterday was his
14 birthday. And we were talking about his past. And I asked
15 him, how long do patents last? Because we have learned here
16 that copyrights last 95 years. And he told me 17 years. And
17 that was it.

18 **THE COURT:** Is that the extent of what you said in
19 the jury room?

20 **JUROR MS. HOSTYNEK:** What did you say?

21 **THE COURT:** In the jury room, is that the extent of
22 what you said to the other jurors?

23 **JUROR MS. HOSTYNEK:** Yes, it is.

24 **THE COURT:** Did your husband say anything more on the
25 subject of patents, to you?

1 JUROR MS. HOSTYNEK: No, because our dinner arrived.

2 THE COURT: And at any time during the pendency of
3 this trial, have you had any discussions with your husband on
4 anything else having to do with this case?

5 JUROR MS. HOSTYNEK: No.

6 THE COURT: With anyone else?

7 JUROR MS. HOSTYNEK: No.

8 THE COURT: What did your husband say was the answer
9 to how long patents last?

10 JUROR MS. HOSTYNEK: He said for him it was 17 years.

11 THE COURT: Any more questions at the -- is that what
12 you repeated in the jury room?

13 JUROR MS. HOSTYNEK: Yes, that's what I said.

14 THE COURT: Anything more that the lawyers wish me to
15 ask?

16 MR. JACOBS: No, Your Honor.

17 MR. VAN NEST: Just one, Your Honor. And that is
18 whether or not the information that Ms. Hostynek received from
19 her husband has influenced her thinking in any way on her
20 deliberations.

21 JUROR MS. HOSTYNEK: Should I answer that?

22 THE COURT: I'm thinking.

23 JUROR MS. HOSTYNEK: Pardon me?

24 THE COURT: Just a moment. I'm thinking.

25 Well, up to this moment, has that influenced your

1 thinking about the case? Just say yes or no.

2 **JUROR MS. HOSTYNEK:** No, no, no, it hasn't. I made
3 up my mind last week. And it hasn't in any way, uhm,
4 influenced me at all.

5 **THE COURT:** Any more questions?

6 **MR. VAN NEST:** No, Your Honor.

7 **THE COURT:** All right.

8 **MR. JACOBS:** No.

9 **THE COURT:** All right, Ms. Hostynek. Thank you. You
10 can go back to the jury room.

11 Dawn, please tell the jurors not to deliberate until
12 I give them the green light to go ahead. All right.

13 (Juror exits courtroom.)

14 **THE COURT:** All right. Counsel, let's have your
15 views. Does anyone want me to bring in more jurors?

16 **MR. JACOBS:** No, Your Honor.

17 **MR. VAN NEST:** Your Honor, I think it might be good
18 to have one more juror asked whether or not anything she said
19 has influenced his or her thinking. And I don't really care
20 who it is. But I do think we should get some sense -- there is
21 sort of a conflict in what we've heard.

22 I understood from Mr. Rutherford that somewhat more
23 had been disclosed than what Ms. Hostynek indicated. But I'm
24 not sure it's that clear.

25 I think it would be desirable to find out from at

1 least one other juror whether anything she said has influenced
2 his or her thinking in the jury room. And maybe the foreperson
3 would be a good candidate for that. That way the other jurors
4 would see it as less random.

5 **THE COURT:** I don't see my copy of the jury
6 instructions that I gave. Here they are.

7 All right. What is the answer to how long the
8 patents in question at the time of all this, was 17 years
9 correct back then?

10 **MR. JACOBS:** One is 17, Your Honor. And the other --
11 17 from issuance. The other is 20 from filing.

12 **THE COURT:** Well, but back at the time java was
13 copyrighted, what was the answer? Is it 20 from the time of
14 filing?

15 **MR. JACOBS:** The law switched right in the middle
16 there, Your Honor, so the -- to give you the specifics, the
17 '104 initial filing date is 1992. So that's 17 years from
18 issuance. The '520 was filed in 1998. By then the law had
19 changed to 20 years from filing.

20 And, of course, the copyrights in question probably
21 span the relevant period. We had a copyright registration for
22 1.4 and for 5.0.

23 **THE COURT:** Mr. Baber.

24 **MR. BABER:** On that last point, Your Honor, the
25 copyright registrations on 1.4 and 5.0 were not applied for and

1 didn't issue until 2004 and 2005.

2 **THE COURT:** So do any of you object if I say to the
3 jury that the term of a patent is either 17 or 20 years,
4 depending on when it was applied for?

5 **MR. JACOBS:** No, Your Honor.

6 **THE COURT:** Do what?

7 **MR. JACOBS:** We don't object.

8 **THE COURT:** Do not?

9 **MR. JACOBS:** Correct.

10 **THE COURT:** Mr. Van Nest.

11 **MR. VAN NEST:** As long as Your Honor says "at most,"
12 or "at most 20 years." That's fine.

13 **THE COURT:** Well, I don't need -- that sounds
14 argumentative. Why can't I just say 17 or 20, depending on
15 when it was applied for?

16 **MR. BABER:** Only because, Your Honor, unless the
17 patent is issued immediately, the 20 years from the original
18 date of application, not the date of issue. So you lose all
19 the prosecution time.

20 **THE COURT:** So I can say 20 years from application or
21 17 years from issuance, and it depends on when it was applied
22 for.

23 **MR. VAN NEST:** Your Honor, if you're going to say
24 anything, shouldn't you also say that's not relevant to this
25 phase of the case, the length of the patent?

1 **THE COURT:** I did say to them how long a copyright
2 lasts.

3 **MR. VAN NEST:** Right.

4 **THE COURT:** I put that in there. I can imagine
5 scenarios by which somebody would be arguing over the 95 --
6 natural question would come up, how long does a patent last,
7 because I do -- I do say in paragraph -- paragraph 17, I say
8 possibly such things can be claimed under the patent system or
9 by trade secret, but they may not be claimed by copyright. And
10 then in a separate paragraph, which is 14, I did say how long
11 copyright lasts. So I can -- I can imagine the temptation for
12 someone in a long deliberation to make that comparison. So --

13 **MR. VAN NEST:** But my point is simply, it's not a
14 relevant factor for Phase One.

15 **THE COURT:** Well, I'm happy to say that, too.
16 Agreed on your side?

17 **MR. JACOBS:** Yes, Your Honor.

18 **THE COURT:** What I propose to do is bring back all of
19 the jury, ask them the question whether or not what she has
20 said is going to influence them -- first of all, say --
21 describe the problem. Tell them what the law is on this point
22 about 20 and 17.

23 I'll say it has been brought to my attention that a
24 member of the jury has made statements in the jury room about
25 how long a patent lasts, and that's why I'm telling them what

1 the law on that is. Tell them it's not relevant.

2 Further then inquire whether or not the statement
3 made by the juror will -- whether anyone on the jury is going
4 to be unable to disregard it.

5 Is that fair?

6 **MR. VAN NEST:** That's fair, Your Honor.

7 **MR. JACOBS:** Yes, Your Honor.

8 **THE COURT:** All right. Let's bring in all 12 members
9 of the jury.

10 (Jury enters at 10:31 a.m.)

11 **THE COURT:** Okay. Welcome back. Have a seat,
12 please.

13 I hope you've all had a good weekend. And I'm sorry
14 to interrupt your deliberations. We'll only do so for a brief
15 period.

16 It's come to the Court's attention that one member of
17 the jury made a comment during deliberations about something
18 that her husband had told her about how long patents last, and
19 to the effect that it would be 17 years.

20 And this was not part of the jury instructions. It's
21 not something that you should be considering. And I remind
22 you, again, that the -- you must be very careful not to discuss
23 with anyone, including your loved ones, the subject matter of
24 this case. And that includes the law of patents and the law on
25 copyrights. You must decide the case based on the law that I

1 give to you.

2 Now, I want to say, since the subject came up, the
3 lawyers and I are all in agreement that I can tell you this
4 much more. This is a statement of the law with respect to
5 patents and how long they last. It's either 17 years from the
6 date the patent was issued by the Patent Office, or 20 years
7 from the date of the application for the patent. And it
8 depends -- which one it is depends upon the time period in
9 which the patent was applied for because in recent years
10 Congress has made a change on that. So 17 years from
11 issuance -- that means approval by the Patent Office -- or 20
12 years from the application.

13 Now, I must say that this is irrelevant to your
14 decision-making. And I -- I can understand ways in which it
15 might have come up, because I did describe in the jury
16 instructions how long a copyright lasts for. So I can imagine
17 how this issue might have come up in your deliberations. And I
18 want to give you the correct information on it. But I want to
19 underscore that it should not be a factor in your decision on
20 what the -- how to come out with the other instructions that
21 I've given to you.

22 Of course, it's always up to you to decide how you
23 want to come out, but please do so based on the instructions
24 that I've given you.

25 Now, is there anyone over there who thinks that they

1 have heard something from any member of the jury on this
2 subject that is going to prevent them from being able to reach
3 a verdict based on the evidence in this case and on the
4 instructions that I've given?

5 In other words, has something -- has the comment that
6 has been made, based on information from outside the trial, so
7 infected your ability to think straight that you will not be
8 able to render a fair verdict based on the evidence and the
9 law? If so, raise your hand.

10 Nobody is raising their hand.

11 I take it from that that you will be able to
12 disregard what it is that the juror said, and you will go
13 forward and deliberate based on the evidence in the case and
14 the instructions of law that I've given you.

15 Correct? Everybody nod if that's correct.

16 (Jurors nod.)

17 **THE COURT:** How about number one over there, are you
18 nodding?

19 **JUROR MR. CHAU:** Yes.

20 **THE COURT:** All right. Now, I'm prepared to let the
21 jury resume deliberating unless the lawyers have another
22 question for me. Anything more?

23 **MR. JACOBS:** No.

24 **MR. VAN NEST:** Nothing here, Your Honor.

25 **THE COURT:** You all continue on. Remember all of my

1 admonitions. Please continue with your deliberations.

2 **THE CLERK:** All rise.

3 (At 10:37 a.m. the jurors retired to resume
4 deliberations.)

5 **THE COURT:** All right. Anything more?

6 **MR. VAN NEST:** No, Your Honor.

7 **MR. JACOBS:** No.

8 **THE COURT:** All right. I'll keep you posted as soon
9 as anything else comes up.

10 **MR. VAN NEST:** Thank you.

11 (Proceedings in recess from 10:38 to 11:10 a.m.)

12 **THE COURT:** Mr. Baber, are you prepared? I guess
13 you'll have to stand in for your team. They are not present.

14 **MR. BABER:** I believe they are on their way, Your
15 Honor.

16 **THE COURT:** Have both sides seen the latest note?

17 **MR. JACOBS:** Yes, Your Honor.

18 **MR. BABER:** Here comes Mr. Van Nest.

19 **THE COURT:** We've received a note from the jury
20 saying -- or at least from Mr. Thompson, foreperson, who says:

21 "Impasse has been reached on the one issue
22 that cannot be decided."

23 Now, they don't say what they said last week, which
24 was they otherwise have a unanimous verdict. But I think
25 that's what they mean.

1 Don't you all agree?

2 **MR. VAN NEST:** That would be -- that seems right,
3 Your Honor.

4 **THE COURT:** Mr. Jacobs?

5 **MR. JACOBS:** Yes, Your Honor.

6 **THE COURT:** So what I do -- what I'm going to propose
7 is that we bring the jury in and receive the verdict. That we
8 receive the verdict to the extent that they have one. All
9 right?

10 **MR. VAN NEST:** That's fine, Your Honor.

11 **MR. JACOBS:** Yes, Your Honor.

12 **THE COURT:** Wait a minute. Where is Dawn?

13 (Pause)

14 (Jury enters at 11:13 a.m.)

15 **THE COURT:** Please, be seated.

16 Mr. Thompson, we received your note that says:

17 "Impasse has been reached on the one issue
18 that cannot be decided."

19 And we take it from that, that you have otherwise
20 reached a unanimous verdict. Is that correct?

21 **FOREMAN THOMPSON:** That is correct, Your Honor.

22 **THE COURT:** Are you prepared to render the verdict
23 now, or do you want more time to deliberate?

24 **FOREMAN THOMPSON:** We are ready to render it now.

25 **THE COURT:** Very well. Has it been signed and dated?

1 **FOREMAN THOMPSON:** Yes, it has.

2 **THE COURT:** All right. Please, hand it to the
3 marshal, who will hand it to me. I will check it to see if
4 it's in proper form.

5 Thank you.

6 (Pause)

7 **THE COURT:** All right. Here's what we need to do.
8 The clerk will read the verdict form with your answers. Each
9 of you must listen carefully. And at the end we will ask you
10 whether or not it is unanimous.

11 Now, when you get to the one which you were unable to
12 answer, then Dawn will skip over that. And so she will only
13 read out the ones where you have checked a box. Then she will
14 ask each of you whether or not the verdict as read is your
15 verdict, your individual verdict. We do that so that we make
16 sure that it's unanimous. Okay.

17 So, please, listen carefully, as the clerk will now
18 read the verdict.

19 **THE CLERK:** Ladies and gentlemen of the jury, listen
20 to your verdict as it will stand recorded.

21 In the case of Oracle America versus Google, Inc.
22 Question 1:

23 "As to the compilable code for the 37 Java

24 API packages in question taken as a group:

25 "A. Has Oracle proven that Google has

1 infringed the overall structure, sequence and
2 organization of copyrighted works?"

3 Answer: "Yes."

4 **THE COURT:** I will note, for the record, that
5 Question 1B went unanswered, and is evidently the question on
6 which the jury was unable to reach a verdict.

7 So proceed to question 2.

8 **THE CLERK:** Thank you, Your Honor.

9 Question 2:

10 "As to the documentation for the 37 JAVA API
11 packages in question, taken as a group:

12 "A. Has Oracle proven that Google has
13 infringed?"

14 Answer: "No."

15 Question 3:

16 "Has Oracle proven that Google's conceded use
17 of the following was infringing, the only
18 issue being whether such use was de minimus:

19 "A. The rangeCheck method in Timsort.java
20 and ComparableTimSort.java."

21 Answer: "Yes (Infringing)."

22 "B. Source code in seven 'Impl.java' files
23 and the one 'ACL' file."

24 Answer: "No (Not infringing)."

25 "C. The English-language comments in

1 CodeSourceTest.java and

2 CollectionCertStoreParametersTest.java."

3 Answer: "No (Not infringing)."

4 Question 4:

5 "Answer the following special interrogatories
6 only if you answer 'yes' to Question 1A.

7 "A. Has Google proven that Sun and/or Oracle
8 engaged in conduct Sun and/or Oracle knew or
9 should have known would reasonably lead
10 Google to believe that it would not need a
11 license to use the structure, sequence, and
12 organization of the copyrighted compilable
13 code?"

14 Answer: "Yes."

15 "B. If so, has Google proven that it, in
16 fact, reasonably relied on such conduct by
17 Sun and/or Oracle in deciding to use the
18 structure, sequence, and organization of the
19 copyrighted compilable code without obtaining
20 a license?"

21 Answer: "No."

22 Signed and dated by the foreperson, Greg Thompson, on
23 May 7, 2012.

24 **THE COURT:** Please poll the jury now.

25 **THE CLERK:** Jimmy Chau, is the verdict read your

1 verdict?

2 JUROR MR. CHAU: Yes.

3 THE CLERK: Jacqueline Gonzalez, is the verdict read
4 your verdict?

5 JUROR MS. GONZALEZ: Yes.

6 THE CLERK: Ronald Rutherford, is the verdict read
7 your verdict?

8 JUROR MR. RUTHERFORD: Yes.

9 THE CLERK: Daniel Liu, is the verdict --

10 JUROR MR. LIU: Yes.

11 THE CLERK: -- read your verdict?

12 Christina Cheng, is the verdict read your verdict?

13 JUROR MS. CHENG: Yes.

14 THE CLERK: Julie Chiu, is the verdict read your
15 verdict?

16 JUROR MS. CHIU: Yes.

17 THE CLERK: Steven Hotvedt, is the verdict read your
18 verdict?

19 JUROR MR. HOTVEDT: Yes.

20 THE CLERK: Greg Thompson, is the verdict read your
21 verdict?

22 FOREMAN THOMPSON: Yes.

23 THE CLERK: Patricia Pearlman, is the verdict read
24 your verdict?

25 JUROR MS. PEARLMAN: Yes.

1 **THE CLERK:** Elisabeth Hostynek, is the verdict read
2 your verdict?

3 **JUROR MS. HOSTYNEK:** Yes.

4 **THE CLERK:** Megan Gallo, is the verdict read your
5 verdict?

6 **JUROR MS. GALLO:** Yes.

7 **THE CLERK:** And, Jennifer Michals, is the verdict
8 read your verdict?

9 **JUROR MS. MICHALS:** Yes.

10 **THE COURT:** All right.

11 **THE CLERK:** Your Honor, the verdict is unanimous.

12 **THE COURT:** All right. The Special Verdict Form and
13 the verdict of the jury, with respect to the questions
14 answered, will be made of record in the files of the U.S.
15 District Court.

16 The one question which was not answered, Question 1B,
17 will be withdrawn from you for your consideration, officially,
18 at this point.

19 So, we thank you for your service so far and for your
20 continued service as we now go to the next phase of the case.

21 And I just want to have a few words for you, which is
22 that your admonition still continues. All of the evidence that
23 you've heard so far can be considered unless I tell you
24 otherwise, can be considered as we go on through the rest of
25 the case.

1 But you are about to start on a phase of the case
2 that has a lot to do with patents and almost nothing to do with
3 copyrights, since we intentionally designed it that way.

4 But, nonetheless, you have learned a lot about these
5 systems, so in some ways this is very useful information for
6 you to have in mind as we go into the next phase of the case.

7 It is important that you not talk with each other
8 now. We're back to the mode where you can't talk with each
9 other, even among yourselves, about the evidence you are
10 hearing.

11 In a few days, it will be your duty to do that and to
12 deliberate, once again, about the patent phase. But not yet.

13 So we're back to no talking among yourselves. No
14 doing any homework. Of course, that's always been the rule.
15 No talking with anyone else on the outside. No looking at news
16 reports. No going online to see what orders or notices or
17 briefs are being filed by the lawyers in this case. That would
18 be wrong to do that.

19 Instead, your job is a lot easier than that, in some
20 respects. And that is, you sit back, make the lawyers do all
21 the work. Make the lawyers present the evidence here in court.

22 And then at the end you decide whether or not the
23 party with the burden of proof has carried its burden of proof.
24 And I'll tell you, once again, at the end of the patent phase
25 what the law there will be.

1 So, we know you're working very hard. We know you're
2 extremely diligent. We thank you for all of that. And we ask
3 for your continued diligence and attention to the case.

4 So what I think we're going to do here is give you --
5 unless the lawyers can think of another admonition, I'm going
6 to give you a few minutes to go back into the jury room.

7 I need to talk with the lawyers and let them set up.
8 We're going to go straight into the closing -- I mean, to the
9 opening statements for the next phase of the case, so that your
10 mind is going to be shifting gears pretty quickly.

11 We're going to go into patents. Patents. I think
12 you're going to start hearing a lot about the virtual machine
13 part that you've heard about, but you're now going to hear a
14 lot more about.

15 So, Dawn, is there something more I should do?

16 **THE CLERK:** No, there isn't, Your Honor.

17 **THE COURT:** How about the lawyers, anything more you
18 want me to say before we give a break to the jury?

19 **MR. JACOBS:** No, Your Honor.

20 **MR. VAN NEST:** No, Your Honor.

21 **THE COURT:** All right. Very well. Please go back
22 into the jury room. We'll call you back in just a few minutes.

23 **THE CLERK:** All rise.

24 (Jury out at 11:22 a.m.)

25 **THE COURT:** All right. Be seated.

1 I'm prepared to go forward in the patent part of the
2 case, but in case there's something I'm overlooking based on
3 the verdict, I ask the lawyers if there's something we need to
4 do here and now?

5 **MR. VAN NEST:** Your Honor, I'm not sure we need to do
6 it here and now, but just to preserve it based on my comments
7 last week, Google would move for a mistrial on Question 1,
8 based on the *Jazzabi* case and the *Altus* case.

9 As I argued last week, I think the law in the Ninth
10 Circuit is clear that where you have a claim and an affirmative
11 defense that would avoid the claim, those are considered,
12 essentially, one equal issue on the question of liability.

13 And I think, in this circumstance, given the way the
14 case was presented and given the law that fair use is an
15 affirmative defense, you could not receive a partial verdict on
16 Question 1. You would have to declare a mistrial. Both of
17 those questions would have to be retried to a new jury.

18 And so I move at this time.

19 **THE COURT:** All right. Thank you for your motion.

20 Any response at this time, or do you want to brief
21 that?

22 **MR. JACOBS:** I think it had best be briefed, Your
23 Honor.

24 **THE COURT:** All right.

25 **MR. JACOBS:** We would so propose.

1 **THE COURT:** Well, let's -- I think the thing to do,
2 Mr. Van Nest, is for you to make a formal motion in writing.
3 Can you do that today? Is that too soon?

4 **MR. VAN NEST:** I probably could present it tomorrow,
5 Your Honor.

6 **THE COURT:** All right. By tomorrow. And then by
7 Thursday at noon the opposition will be due. Does that give
8 you enough time?

9 **MR. JACOBS:** Thank you, Your Honor.

10 **THE COURT:** You're most welcome. All right.
11 Anything else you want to bring up about the verdict?

12 One thing that I think you need to be thinking about
13 is, does this mean then that that simplifies Phase Three for
14 the -- on the damages, since the -- looks like rangeCheck is
15 the only thing of which there is a clear-cut finding of --
16 that's statutory damages, right, as I understand it?

17 **MR. BOIES:** Your Honor, in terms of the damage side,
18 that's correct. We don't have a separate damage calculation
19 for rangeCheck.

20 With respect to infringer's profits, that still is an
21 issue. And that is something that we'll have to probably brief
22 to the Court, at some point, and then depending on the Court's
23 decision either try or not try.

24 **THE COURT:** I had thought you had said last week that
25 on the rangeCheck you would only be asking for statutory

1 damages.

2 **MR. BOIES:** In terms of the damage side. In other
3 words, in terms of copyright -- unlike patent, of course -- we
4 have both the damage to the --

5 (Deputy marshal enters courtroom.)

6 **THE COURT:** Just a moment. You have a note? May I
7 see it?

8 This is a note to Dawn: "Please provide more
9 notebooks for Phase Two."

10 (Laughter)

11 **THE COURT:** Very good question. I'll give you that
12 note.

13 **MR. BOIES:** They're settling in, Your Honor.

14 **THE COURT:** All right. So -- all right. Say that
15 again. I thought you told me the other day that for Phase
16 Three it came out this way you would only be asking for
17 statutory damages.

18 What am I hearing about --

19 **MR. BOIES:** I've interpreted the Court's question
20 perhaps incorrectly. That you had asked whether there was a
21 separate damage calculation, whether we had a damage
22 calculation for the three literal copying issues.

23 And we do not have a separate damage calculation. We
24 have not attempted to do a damage calculation that relates just
25 to those. And with respect to that, the only thing we would

1 claim would be statutory damages.

2 But, of course, in copyright you get both your
3 damages plus you get infringer's profits.

4 **THE COURT:** What is the basis for asking for profits?

5 **MR. BOIES:** Well --

6 **THE COURT:** Nine lines of rangeCheck out of
7 15 million lines of code, you want all their profits?

8 **MR. BOIES:** No, we don't want all their profits, Your
9 Honor. But they bear the burden on that issue.

10 **THE COURT:** I don't think so. I think you better
11 brief this.

12 **MR. BOIES:** Fair enough.

13 **THE COURT:** I believe it borders on the ridiculous to
14 say that nine lines of code you are going to get even a
15 percentage of their profits. You told me the other day this
16 would be statutory damages. Now you're changing your tune.

17 Well, maybe I misunderstood what you were saying.
18 But if you're now saying that you get some kind of disgorgement
19 on account of nine lines of code being copied, you're going to
20 have to brief that. That would be -- that would be a big, big
21 stretch.

22 So, I'll let you brief it. But you might as well be
23 on notice, I think that would be way out there for you to ask
24 for that. And then we have time to have it briefed. Right now
25 my inclination is this: The only thing that would go to the

1 damages would be statutory damages on copyright, plus the
2 patent part.

3 **MR. BOIES:** Your Honor, may I inquire?

4 **THE COURT:** Sure.

5 **MR. BOIES:** If the Court concluded that we were
6 entitled to judgment as a matter of law --

7 **THE COURT:** On the -- yes.

8 **MR. BOIES:** -- on the fair use --

9 **THE COURT:** Yes.

10 **MR. BOIES:** -- would you then send that --

11 **THE COURT:** Yes. If I could do that in time. But
12 I'm not there yet. I may not ever get there. I think there
13 are arguments that go both ways on that. I would have to read
14 your brief on it.

15 Has that brief already been filed?

16 **MR. BOIES:** Yes, it is, Your Honor.

17 **THE COURT:** When did that get filed?

18 **MR. JACOBS:** That was filed with our JMOL motions,
19 Your Honor. And so the -- the oppositions are due today, I
20 believe, at 6:00 p.m. And the motion itself was filed last
21 week.

22 **THE COURT:** All right. I will consider that
23 possibility. I recognize that if you, as a matter of law, were
24 entitled to verdict on Question 1B, then that would put the --
25 put all those disgorgement issues back in play. That's a very

1 legitimate point.

2 **MR. KWUN:** Your Honor, just one point on that, since
3 Mr. Jacobs just said JMOL oppositions are due at 6:00 p.m. You
4 had actually said 5:00 p.m. We should all be in agreement on
5 that. I think it's 5:00 p.m.

6 **THE COURT:** I don't remember.

7 **MR. JACOBS:** What he said, Your Honor, is fine.

8 **THE COURT:** Okay. Excellent. So anything more on
9 the aftermath of the verdict that you want to bring up right
10 now? If so, I'm all ears.

11 **MR. VAN NEST:** The -- just a question on the
12 briefing. I understand the mistrial briefing would be tomorrow
13 and Thursday. What does Your Honor contemplate in terms of the
14 Phase Three briefing we discussed?

15 **THE COURT:** Well, no. Let's do it on exactly the
16 same schedule.

17 Here's my thought. Unless the Court can give a
18 verdict, required verdict JMOL under Rule 50 in favor of Oracle
19 on Question 1B, my view of it is that there is almost
20 nothing -- in fact, nothing really; one line item of statutory
21 damages -- to go to the jury. And that's on the nine lines on
22 rangeCheck. Because there has been zero finding of liability
23 on any copyright so far. The -- because the issue on the
24 affirmative defense of fair use is still in play.

25 However, if the Court were to say, no, Google has

1 failed to prove that, and no reasonable jury could find on that
2 issue, then Oracle would be correct that it should go to the
3 jury. And we will get that sorted out by Thursday.

4 So we're going to use the same briefing schedule that
5 I came up with for your other issue. We'll say tomorrow --
6 brief due tomorrow, responsive brief due Thursday.

7 Okay. Anything more?

8 **MR. JACOBS:** Your Honor, I think we covered this, but
9 I wanted to be sure. Will you be playing the patent video
10 before openings? I would so request.

11 **THE COURT:** Yes. We have it ready to go?

12 **THE CLERK:** Actually, I believe the IT person is
13 going to play that back for us, or play it for the jury.

14 **THE COURT:** Who is?

15 **THE CLERK:** Thomas.

16 **THE COURT:** Are you ready to go with that? Do we
17 have the model instruction -- I mean the patent handout?

18 **THE CLERK:** I have it.

19 **THE COURT:** Can I see what it is we're handing out?
20 Has everyone seen this sample patent --

21 **MR. VAN NEST:** I haven't seen it in a while, Your
22 Honor. Is it the one with the stool?

23 **THE COURT:** Yes.

24 **MR. VAN NEST:** That's fine.

25 **THE COURT:** All right. So that will be -- that will

1 be handed out. So we'll do that.

2 And we're unlikely to get all the way through until
3 1:00 o'clock today, with both openings, but that's just the way
4 it's going to be. We'll get as far as we can and pick it up
5 tomorrow.

6 And do we have the -- I think I'm going to wait on
7 handing out the -- are any of you going to be referring to the
8 color-coded thing?

9 **MR. VAN NEST:** I will be, Your Honor, but I have a
10 slide on it, so I think --

11 **THE COURT:** I tell you what, do we have it ready to
12 hand out?

13 **MR. JACOBS:** We do, Your Honor.

14 **THE COURT:** So let's hand out the color-coded thing
15 and the stool, three-legged stool at the same time, to save a
16 little time.

17 All right. Dawn, I think we're ready in here. You
18 can give them the notepads, and we'll get started.

19 (Jury enters at 11:40 a.m.)

20 **THE COURT:** All right. Please be seated.

21 And so now patents. Patents.

22 You're going to hear in a moment about what patents
23 are, but patents are something that Congress has authorized.
24 It's actually in the Constitution that Congress can do so.

25 And patents are issued by the Patent Office in

1 Washington, D.C. And they give a right to -- exclusive right
2 to the holder of the patent to make, use, or sell the method or
3 apparatus that's described in the claims at the end of the
4 patent.

5 Now, because we have lots of patent cases in our
6 country, the Federal Judicial Center in Washington, D.C. --
7 which is an adjunct of the court system -- has come up with a
8 short video that is very good at explaining how the patent
9 system works. So we're going to play it for you right now.
10 But before we play that, we're going to give you two handouts.

11 Are we ready to do the handouts?

12 **MR. JACOBS:** Yes, Your Honor.

13 **THE COURT:** So these handouts will be -- one of them
14 gets referenced in the middle of the video. And we think it
15 would be useful for you to have this handout so when it comes
16 up in the video you can look at it and see what we're talking
17 about.

18 So, Dawn will hand those out to you. Okay. And now
19 we want to hand out -- did you also hand out these color-coded
20 things?

21 **THE CLERK:** I did.

22 **THE COURT:** So Dawn was one step ahead of me. She
23 has also handed out a color-coded item that will make a lot
24 more sense to you if I explain that to you later. So just put
25 the color-coded item to one side.

1 And the one you are going to need during the video is
2 the one that says *An Introduction to the Patent System*. That's
3 the one that will come up in this video, which lasts about 15
4 minutes. So this is not a long video, but it is very good.

5 It's one that's created not by any lawyers in the
6 case. It's created by the Federal Judicial Center, Washington,
7 D.C. And it is evenly balanced to be a -- just kind of a
8 straight description of how the system works.

9 So, at this time, are we ready to play the video?
10 So, please, it should show up on your screen and have audio at
11 the same time. Roll the tape, please.

12 (*An Introduction to the Patent System* video played in
13 open court.)

14 **THE COURT:** Very well. I hope you all enjoyed that.
15 That's an excellent summary of the patent system.

16 Counsel, do you want me to take up the handout? Did
17 any of you over there make any notes on the handout? Yes? No?

18 (Jurors responding negatively.)

19 **THE COURT:** Should I take that up? I think I
20 probably should take up the -- so, please, pass back down to
21 the end the little handout on the introduction to the patent
22 system.

23 And, Dawn, will collect those please.

24 (Whereupon, handouts was passed to
25 the clerk.)

1 **THE COURT:** Now, you should still have in your hands
2 the other one which has the red underlining.

3 Okay. I'm going to give you a word about the red
4 underlining and the lawyers will explain this -- these claims
5 in much more detail in a moment. I'll just say for now that
6 the red underlining represents the items that are in dispute,
7 and the things that are not underlined are not in dispute and
8 are conceded.

9 Is that correct, counsel?

10 **MR. VAN NEST:** That's right, your Honor.

11 **THE COURT:** All right. Correct?

12 **MR. JACOBS:** Yes, your Honor.

13 **THE COURT:** So this is a device that your judge has
14 come up with and the lawyers have graciously agreed to go along
15 with to help simplify for you the issues that you need to be
16 focusing on. It's mainly the underlined material because those
17 are the ones that are in play. The non-underlined parts are
18 not in play and are conceded.

19 And what you will find is that whenever infringement
20 is accused, the owner of the patent has got to prove that the
21 accused device has every single one of the limitations; not
22 just three out of four, but if there are four, all four. So
23 the limitations have to be proven completely in order to prove
24 infringement. Again, it's not enough to prove three out of
25 four or even three-and-a-half out of four. It's got to be four

1 out of four, to use a simple example.

2 So this, this underlining helps focus your attention
3 on the parts that are in play.

4 Now, of course, you're going to want to know and
5 understand the technology well enough that by the time this
6 phase is over, you will, in fact, understand the rest of the --
7 the part that's not underlined. I'm sure that that will occur.
8 But you need to pay particular attention to the parts that are
9 underlined.

10 Okay. Now, what I would recommend you do is put the
11 handout to one side.

12 And for the record, the handout looks like it's been
13 marked as Exhibit 1106.

14 And this is -- this underlining does represent
15 evidence that you are able to take into account; meaning, that
16 if it's not underlined, it's conceded. This is like a
17 stipulation. Both sides agree to that.

18 So we are now going to have the opening statements.
19 Each opening statement will be about 45 minutes. It looks like
20 from the hour we will probably just get the plaintiff's opening
21 statement today, then we'll go to the other. It will be 45
22 minutes.

23 Remember what I said many times, what the lawyers say
24 in opening statement is not evidence. It's a forecast of what
25 the lawyers expect or hope that they will be able to prove.

1 They will show you emails and things on the screen. Some of
2 them are in evidence. Others may not be in evidence already.

3 But remember if it's not ultimately -- if it doesn't
4 ultimately come into evidence, then the fact that the lawyer
5 referred to it in the opening statement doesn't matter, because
6 what the lawyers say in the opening statement is not evidence.
7 This applies to both of the opening statements. But then right
8 after that, we're going to get down to putting on witnesses and
9 so forth, getting the evidence before you.

10 So at this time on behalf of Oracle America,
11 Mr. Jacobs, you may give the opening statement.

12 **MR. JACOBS:** Mr. Jacobs.

13 **OPENING STATEMENT**

14 **MR. JACOBS:** So we're going to talk about patents and
15 you've seen the patent video and you spent a lot of time in
16 Phase 1 on copyright and so it's worth just spending a minute
17 on the difference between the two.

18 In Phase 1 we talked about copyright and the creative
19 expression that copyright protected and that had to do with the
20 Structure, Sequence and Organization, the Application
21 Programming Interfaces.

22 You may recall that I elicited testimony from Mr.
23 Bloch about all the authoring, all the writing that went on
24 when he was creating those Application Programming Interfaces,
25 because that's what copyright protects, protects the expression

1 of the author.

2 But patents protect inventions. So there's no
3 requirement -- unlike copyright there is no requirement of
4 copying. There is no requirement of creativity or expression.
5 It's all about the invention.

6 And you saw from the patent video that the invention
7 is described, its claim in the patent itself, and the principal
8 question that you will be facing in this trial is whether the
9 claims of the two patents that we have asserted against Google
10 and Android, whether those claims are, in fact, present in
11 devices that are running Android or that have been developed
12 using the Android developer kit.

13 So we're going to be looking at the claims. We're
14 going to be look at Android. We're going to be looking for a
15 match-up. And if the match-up is there, then we win.

16 I think you will be pleased to know that fair use is
17 not an issue in the patent case. So, in some ways it's a
18 simpler analysis. You just look at the claims. You look at
19 the accused device and you see that there's that match-up.

20 And as Judge Alsup indicated, he has come up with
21 this very helpful technique of having us underline where the
22 dispute is, so when we get to the claims, you'll see what
23 Google is claiming is not present in their devices running
24 Android and we say is present. And that's what the -- part of
25 the dispute will be about.

1 (Document displayed)

2 Now, in Phase 1 we spent a lot of time talking about
3 the Application Programming Interfaces and the core libraries.
4 We're going to leave that behind for Phase 2 and we're going to
5 be talking about another aspect of the Java environment and the
6 Android environment.

7 And this slide that's on the screen now will be
8 familiar to you. This is the basic illustration we used in
9 Phase 1 to describe how Java creates "write once, run
10 anywhere," the Java Virtual Machine is running on all the
11 computing devices and how Android fragmented that because it's
12 different from Java.

13 And what is going to be important in Phase 2 is not
14 so much those differences, but the basic similarities between
15 Android and Java when it comes to this basic architecture or
16 design of a system.

17 (Document displayed)

18 So let's look a little bit more closely at how the
19 Java world looks and what the problems that the inventors of
20 these patents had to solve.

21 This is a different kind of depiction of a stack of
22 what a Java developer today is working with. So at the top you
23 have somebody writing code, and he writes it in source code and
24 that's the blue box. That source code is put through a tool
25 that you heard about in Phase 1 called a compiler. And what

1 the compiler does is take the English language statements of
2 the programmer -- sorry, the high level language statements of
3 the programmer, in this case let's say in Java, and compiles
4 them to something that is more close, that is closer to what
5 the computer needs in order to actually run the program.

6 And in the Java world, what that is called is
7 bytecode. Java bytecode. And I'll show you a picture of Java
8 bytecode in a minute. Right now what one needs to understand
9 is that Java bytecode looks a lot more like the code that will
10 actually cause the computer to run.

11 If you spend any time around computers, you know that
12 computers basically respond to ones and zeros, not to words
13 like "if" and "else." So we have to ultimately get to ones and
14 zeros in this bytecode. The words of one of the patents is
15 kind of an intermediate code.

16 That bytecode runs on something called, in the yellow
17 box, the Java Virtual Machine. The Java Virtual Machine is
18 that layer of software that's on all of the computers that
19 support Java and the Java Virtual Machine actually interprets
20 the Java bytecode. So this is a new detail on how "write once,
21 run anywhere" works, because we're talking now about this
22 intermediate code called bytecode and how it runs on something
23 called the Java Virtual Machine.

24 Now, "virtual," what does that mean? Well, it kind
25 of means -- it's sort of like pretend. What the Java Virtual

1 Machine does is it looks to the bytecode and says: Ignore
2 what's down in the black box. Ignore what's down in the
3 computing device. I'm going to face up to you the code and I'm
4 going to present a layer that you can run on. And it's virtual
5 in that it's not real, it's not physical. It's in some sense
6 an artificial machine. It sort of looks like a machine, but
7 it's a software layer.

8 Now, let's look at the stack on the Android side
9 built around the same basic design motif, if you will. And
10 recall that in Android somebody -- the application programmer
11 writes in the Java programming language. And I've colored it
12 green and blue here because -- just to remind you in Phase 1 we
13 talked about the difference at the API level, and that there
14 was this -- it wasn't all pure blue because Java is fragmented
15 by Android at the Application Programming Interface level. But
16 for present purposes, the programmer is writing in the Java
17 programming language and that programming language is also
18 going to go through the Java compiler.

19 Now, let me pause there for a minute. Let me just
20 say that again. If you're on the Android side and you're
21 writing programs for Android, your source code is going to go
22 through a Java compiler. And the way that works is that
23 Android tells the people programming for Android, it says: Go
24 to the -- it says to them: Go to the Oracle website and
25 download onto your computer a Java compiler.

1 So the Java compiler on the left side is the same
2 compiler as the Java compiler on the right side. And that will
3 become important in the case of one of the patents that we're
4 dealing with here.

5 Now, you heard a little bit about this in Phase 1,
6 how at some point in the development of Android the Android
7 team decided they weren't going to adopt a pure Java virtual
8 machine. Instead they departed from the Java Virtual Machine
9 specification and they adopted something called Dalvik.

10 And here is how this basic mechanism works.

11 (Document displayed)

12 On the developer's computer -- so looking at the blue
13 box, the orange box and that bolted on green box called "dx
14 tool," on a programmer's computer, the person who is writing an
15 application programmer now, there is an additional feature
16 created by Google for Android called the dx tool. And the dx
17 tool converts the Java bytecode which comes out of the Java
18 compiler into something called dex code. So what is then sent
19 to the user's computer from the developer's side, whether it's
20 over the internet or by a disc that's being installed in the
21 old days -- say, if they were installing, like, a DVD, that's
22 how we were installing the application -- the dex code is the
23 code that is actually sent to the user's computer to run on
24 that computer.

25 And then there's something called the Dalvik Virtual

1 Machine, which presents that layer upwards that says, "Look for
2 me. Don't look for the underlying black computing device."
3 And in the Dalvik Virtual Machine there are two functions that
4 we'll be talking about in this patent case. One is called
5 dexopt. Opt stands for optimization, which stands for making
6 better. And the other is the bytecode interpreter, which takes
7 the dex code and interprets it much like the Java Virtual
8 Machine interprets Java bytecode.

9 That was a series of mouthfuls. What you need to
10 keep in mind for present purposes is that there is this dx tool
11 on the developer's side and on then the machine side is the
12 Dalvik Virtual Machine there's something called dexopt and the
13 bytecode interpreter.

14 (Document displayed)

15 Now, just to give you a peek of what this code looks
16 like, you may recall from Phase 1, I think somebody wrote the
17 code on the left side. It's a famous piece of code called
18 Hello World, and its function is to run and print out on the
19 screen "Hello World."

20 And in the middle column of the screen we've printed
21 out for you what the Java bytecode looks like. You can see
22 it's very hard to understand to a layperson. Very hard to
23 understand for a programmer. You really need to be expert in
24 Java bytecode to understand it.

25 And then on the right side we've printed out what the

1 Android dex code looks like. And you can see that they are
2 very different. But they are both intermediate kinds of code
3 running on virtual machines. And that essential similarity is
4 what drives the -- drives this case, this patent phase of this
5 case for reasons that I will explain.

6 These patents, the two patents in this case are about
7 making phones run fast. They are about making phones run fast.
8 Now, if you think about this a little -- think about this for a
9 moment. This is kind of obvious. We all want -- when we turn
10 on our phone, we want it to be there in an instant. And if
11 you're like me, we've become very impatient with any kind of
12 delay in any kind of computing device. That's the first point.
13 We're impatient.

14 The second point is that phones are small computers
15 and they don't have big memories or big processors or very
16 large power supplies plugged into the wall. They are running
17 on batteries. They have -- typically they have smaller
18 processors and less memory than a full computer. So getting a
19 phone to run fast is a challenge.

20 Back in the 90's when Java was being developed,
21 getting computers to run fast was a challenge, especially with
22 the interpreter in the way.

23 So let's remind ourselves what's going on. On both
24 the Java side and the Android side we have this virtual
25 machine; Java Virtual Machine, the Dalvik Virtual Machine.

1 You may remember from Phase 1 this analogy I drew to speaking
2 to someone through an interpreter. If I'm speaking to you
3 through an interpreter, my speed is going to have to go down
4 because somebody is in the middle translating every word I say
5 and then you have to pick up the translation. And so we all
6 slow down if we're talking through interpreters.

7 And the same thing is true with a virtual machine.
8 The virtual machine is a software layer. This slide
9 illustrates what the virtual machine has to do. It has to go
10 out and get the bytecode instruction. It has to decode it,
11 translate it into the native language. Then it has to execute
12 it and it has to go through that cycle. And so just like a
13 human interpreter or human translator, the virtual machine adds
14 what's called overhead and slows things down.

15 Now, there is one other way the analogy works here.
16 If you were taking notes as I speak, you're using up a certain
17 amount of paper. If there is an interpreter who is taking
18 notes as I speak to interpret for you, the paper is doubled.
19 And the same is true when we're talking about an interpreter on
20 a machine. The amount of memory that is going to be used,
21 where computer memory is now analogous to your paper memory, is
22 going to increase. So the use of an interpreter actually
23 creates two problems for a Java developer or for Android
24 developer.

25 Problem number one, we've got to run fast. Problem

1 number two, we can't use up too much memory.

2 (Document displayed)

3 When the Google developers were developing Android --
4 and recall from Phase 1 they are trying to get this thing to
5 market. They are trying to get there before -- at the
6 Microsoft and the iPhone comes out, so they are really trying
7 to get lots of Android on lots of devices quickly in order to
8 capture the developer community. So all of this is happening
9 in a very compressed period and they realize that they faced
10 this technical challenge.

11 And so we have this email, TX 23, in which one of the
12 developers says to another:

13 "If the device is not fast and stable, we
14 fail."

15 It's really got to work quickly. And back in 2007,
16 2008 the devices were even smaller with less memory than they
17 are today. So this was a very serious challenge.

18 And then in another email from the same developer,
19 TX 218, Mr. Swetland, he says:

20 "This really isn't a debate. This system is
21 too slow. The system uses too much memory.
22 Smaller, simpler, faster, more reliable wins
23 across the whole system."

24 So that Android developers realized that they faced
25 these kinds of technical challenges. They had to get the

1 device to run fast and they couldn't use too much memory. And
2 they were very worried.

3 You can see from this, from TX 218 how worried the
4 developers are about achieving this. And at the beginning of
5 this email, the contrast is drawn with the desktop computer:

6 "We're building an embedded system."

7 That is what Android is going to be an embedded
8 system.

9 "It is massively slower and has massively
10 less memory than a modern desktop or server
11 computer."

12 So we're building this for phones, for other kinds of
13 embedded systems. They don't have a lot of capability. We
14 have to solve these problems.

15 (Document displayed)

16 You saw in the video the red ribbon version of the
17 patents. When a patent goes through the Patent Office, it
18 comes out -- it looks like this (indicating), because it's
19 quite a process to get a patent. It's expensive and it's time
20 consuming and it's important.

21 So we have two patents that are in this phase of the
22 lawsuit. One is going to be called the '104 patent, and the
23 other is going to be called the '520 patent. And you will be
24 getting photocopies of these as exhibits.

25 These patents are patents that were developed by Java

1 developers back in the 90's to solve the problem of performance
2 and memory that the developers faced in those days. Of course,
3 Java in those days wasn't aimed at phones. It was just aimed
4 at computers.

5 But the same problem was present. We were going to
6 be running this interpreter. We're going to be using this
7 intermediate form of code. We've got to make sure that things
8 perform well and that we don't use too much memory. So these
9 two patents solve those problems -- or address those problems.

10 (Document displayed)

11 So let's talk first about the so-called -- what we're
12 going to be call the '104 patent. The title of the patent
13 starts to give us a clue of what it's about. It's called
14 "Method and Apparatus for Resolving Data References in
15 Generated Code."

16 What's the generated code? That's the code that
17 comes out of -- in the Java world, comes out of the Java
18 compiler. In the Android world, comes out of the Java compiler
19 and then the dx tool. That code is generated on the
20 developer's side and then it's going to be installed on the
21 user computer and it's going to run. And it's going to have
22 data references in it -- we will explain what we mean by
23 that -- and those are going to be, quote, resolved.

24 And the inventor on this patent, you've heard his
25 name was James Gosling. He is kind of the father of Java.

1 And, of course, it was assigned to Sun Microsystems as the
2 owner when he prepared it and when it was granted. And it
3 dates back into are the 1990's.

4 Now, when you study this patent, you will see that it
5 has some history to it because it was actually -- the invention
6 described in that patent was examined a couple of times by the
7 Patent Office and the actual '104 patent is called a reissue
8 patent, because the original patent, which was numbered here as
9 you can see on the slide with 5,367,685, went through yet
10 another procedure in the Patent Office like the one you saw in
11 the video to evaluate it and decide whether it was properly
12 granted and what the scope of the claims would be.

13 So this patent was thoroughly examined in the Patent
14 Office. And the upshot is that in this trial, you will be
15 pleased to know, you only have issues of infringement. The
16 only defense Google is offering to these two patents is "we
17 don't infringe."

18 Now, let's try to get a sense in my few minutes of
19 what this patent is about. You'll be hearing much more about
20 it over the course of the next few days.

21 The basic idea of this patent is to resolve data
22 references. You can see that in the underlining of this
23 abstract.

24 (Document displayed)

25 And provide execution performance -- meaning good

1 performance when executing the code -- that's substantially
2 similar to the traditional compiled approach. Meaning, we want
3 to get performance here as if there is no virtual machine
4 running on the computer and we just wrote code directly for
5 that computer in the first place. And so that's what the basic
6 goal of the invention of the '104 patent is. We want to get
7 performance that's just as if there was no interpreter between
8 us. I want to be able to talk as fast to you through an
9 interpreter as I could if there was no interpreter present.

10 (Document displayed)

11 Now, in your packet you have Claim 11 with its
12 underlining. We're going to be talking about several claims of
13 the '104 patent. But here is the basic -- here is the claim,
14 which is the property boundaries, and this is what we assert
15 Google infringes.

16 So we have got an apparatus, that will be the cell
17 phone. We have got memory that contains the intermediate form
18 code. We talked about that a few minutes ago. And some of the
19 instructions in that intermediate form code contain something
20 called a symbolic reference. A symbol. And that is going to
21 be the heart of the dispute about this patent, is what is a
22 symbolic reference or, more precisely, is what Google has done
23 in Android taken care of something called symbolic references?

24 Now, the words itself suggest the meaning. A
25 symbolic reference is reference by way of a symbol. And we all

1 know in our daily life what kind of symbols we use. We use our
2 Social Security number, that's a symbol for us. We use juror
3 number. That's become a symbol for us. But the best analogy
4 for this particular patent is the following.

5 When you were summoned here for jury duty you, were
6 summoned to Courtroom 8, and you probably thought to yourself,
7 "How am I guessing to get to Courtroom 8?" And so maybe you
8 arrived at the courthouse and you looked at the board
9 downstairs. You asked a guard, said, "Where a is "Courtroom
10 8?" And you were pointed to the 19th floor and then you walked
11 down the corridor and you found yourself in Courtroom 8.

12 Courtroom 8 is an symbolic reference. It doesn't
13 tell you exactly where this courtroom is. You now know exactly
14 where this courtroom is in this building and space, if you
15 will. When you get off the elevator, you turn left and you
16 walk past three doors and then you're at Courtroom 8. You now
17 know the actual location of the courtroom; three doors down,
18 turn left.

19 And so what this claim is saying is that we've got
20 instructions containing one or more symbolic references and
21 we've got a processor that's going to execute those
22 instructions containing symbolic references by determining a
23 numerical reference corresponding to the symbolic reference
24 storing the numerical reference and obtaining data in
25 accordance with the numerical reference.

1 Now, let's just play out my courtroom analogy here.
2 Let's suppose that you cannot remember the next time you come
3 where Courtroom 8 is. What are you going to do? Well, you're
4 going to go to the board again, or you're going to ask a guard
5 again. You're going to say, "Where is Courtroom 8?" And they
6 will direct you to the 19th floor and you're going to hunt your
7 way down the corridor. And, believe me, I do this from time to
8 time. Courtroom 8 is very familiar to me now, but I often have
9 to check the board.

10 And so if I can't remember, I have to go through
11 these steps of looking up the symbolic reference in some kind
12 of table, what a computer would do, and then finding the actual
13 location, third door down on the left. And this patent claim
14 is about doing this in a computer and remembering it. So that
15 the second time around you encounter Courtroom 8, you don't
16 have to go back to the beginning and start over.

17 Now, one of the things you will learn in the course
18 of this lawsuit is when the parties disagree about what claim
19 language means, Judge Alsup decides that question and you get
20 instructions at the end in which this meaning of the claim term
21 was given to you.

22 So symbolic reference -- which is, again, the focus
23 of the dispute -- has been given a definition. It is a
24 reference that identifies data by a name other than the numeric
25 memory location of the data and that is resolved dynamically

1 rather than statistically.

2 So back to my Courtroom 8 analogy. The symbolic
3 reference identifies this courtroom by name, Courtroom 8.
4 Until you know the layout of the courtroom in detail, you know
5 nothing about Courtroom 8; just that there is a Courtroom 8 and
6 you're going to have to find it somewhere.

7 Now what you're going to end up putting in your head
8 is the numeric memory location; third door down on the left.
9 And what the computer ends up putting in its memory is a
10 numeric memory location so that, again, the next time around it
11 doesn't have to start all over again and look up where
12 Courtroom 8 is.

13 Now, I told you that this is the heart of the
14 dispute. What is the evidence of infringement in a lawsuit
15 like this where Google has prepared a set of programs that
16 makes available on its website, it then installs on its own
17 phones, and it makes available for third parties, the Samsung's
18 the Motorolas the world, to install on their phones and on
19 their computers for their developers. The evidence is the
20 code. The evidence is the source code. And the evidence is
21 what their developers have said about the source code. Because
22 the Google Android developers have given presentations that
23 describe how they achieved high performance and how they
24 achieved good satisfactory memory usage.

25 And right in the Android code is a description of a

1 routine that does exactly what this claim language discusses.
2 And you'll note the word that's been highlighted here "symbolic
3 references." So the Android developers when they were writing
4 comments for themselves said, "What we are going to do is
5 convert symbolic references into pointers." Pointers meaning
6 locations in memory. Third door down on the left. Courtroom
7 8, third door down on the left.

8 Now, Google is going to argue to you that symbolic
9 references, as discussed in this code, are not symbolic
10 references. And their argument is going to be based on the
11 fact that the symbols they have chosen have numbers in them.
12 And so they are going to say that's not a symbolic reference.
13 That's a numeric reference.

14 But let's go back and look at the definition of a
15 symbolic reference.

16 (Document displayed)

17 A symbolic reference identifies data by a name other
18 than the numeric memory location of the data.

19 And, again, we know very well from every day life,
20 and computer scientists will tell you this is completely -- the
21 idea that Google is offering that a symbol cannot include
22 numbers in it makes no sense from the computer science
23 standpoint. But we know symbolic references that have numbers
24 in them all the time. Again, our Social Security number. A
25 speed dial on a phone. These are all symbolic references with

1 reference in them.

2 When Google argues that they don't have symbolic
3 references in their intermediate code that need to be resolved
4 into pointers in accordance with the claims of the '104 patent,
5 please remember this source code, which says we resolve
6 symbolic references.

7 Again, this is Android source code, written by
8 Android developers, talking technical language before this
9 litigation began and, again, the word -- the lineup of the
10 words is very close. Symbolic references in the code in 2008,
11 2009 and 2010. Symbolic references in the claim language
12 dating back from the 90's.

13 Now, if you've had any doubt that I accurately
14 described the Android code, then I hope you will pay close
15 attention when we introduce TX 816.

16 (Document displayed)

17 Because TX 816 is a presentation by Mr. Bornstein,
18 who you saw in Phase 1, and we will be bringing him back. And
19 Mr. Bornstein describes in almost word-for-word, little more
20 technical, what I described for you a few minutes ago. So
21 let's just take it word-for-word.

22 We do optimization. What's optimization? That's
23 making things run better. And so the first time that a dex
24 file, a data-dex file lands on a device. So we call it the dex
25 file. Comes out of the developer's computer, and it lands on a

1 phone. We do that verification work. We also augment that
2 file. If we have to, we will do bite swapping and pad -- pad
3 out structures. That's all tangential.

4 And, in addition, we have a bunch of other things
5 that we do, such that when it comes time to run, we can run it
6 much faster.

7 So as an example of static linking. Before when a
8 dex file arrives on a device, it will have symbolic methods to
9 methods and fields; symbolic methods. Let me say that one more
10 time, symbolic methods. But afterwards it might just be a
11 simple integer v-table offset. Integer v-table offset. That's
12 the numeric reference. Integer v-table offset. It's an offset
13 in a table. Third door down on the left.

14 So that when for invoking a method, instead of having
15 to do, say, a string based lookup -- that is, look at the
16 memory map and figure out where Courtroom 8 is -- it can just
17 simply index into a v-table. It can go directly, third door
18 down on the left without having to do that look up and run much
19 faster.

20 So, again, the heart of the dispute on the '104
21 patent and its various claims is going to be this word
22 "symbolic reference."

23 And, again, outside of the context of this lawsuit
24 when Mr. Bornstein was describing what they do, he said, "We
25 convert symbolic references." And he essentially said in

1 slightly different language, "We convert it into a numeric
2 reference within the meaning of the claim language."

3 (Document displayed)

4 Now, it happens that this an important patent for
5 Android. Google is going to argue that they don't really know
6 what happens out in the field when Android is downloaded. And
7 we're going to be presenting to you a range of evidence to
8 establish by a preponderance of the evidence that this
9 function, which is present in Android as delivered by Google on
10 its website, is also present on the phones from the companies
11 like Motorola or Samsung that install Android on their phones.

12 And one piece of evidence will be the performance
13 improvement that our experts, both in-house and outside at
14 Stanford, observed when they tested what happens if you take
15 out the '104 patent from Android. And what you can see is that
16 with the '104 patent, we're at 100 percent. When it's removed,
17 under two benchmarks you get performance worse than one-tenth
18 as fast. And on the third benchmark you get it about
19 80 percent as fast. These benchmarks are standard industry
20 ways of testing the performance of software solutions.

21 So the idea that somebody out in the field will take
22 out the '104 patent when it's so important to the performance
23 of the device, we hope you will conclude is absurd.

24 (Document displayed)

25 And, of course, once again, speed is really

1 important. And this is a message from Eric Schmidt, who you
2 saw in Phase 1, one of the three leaders of Google, that he
3 sent out. He sent out various versions of this.

4 "Milliseconds matter to users. We are all
5 really impatient."

6 And so for Android to work well, it needs features
7 such as that embodied and claimed by the '104 patent.

8 Let me bring you to the second patent, which is the
9 '520. You will hear these numbers '104 and '520.

10 So the '520 is addressed to memory usage and its
11 inventor's were named Yellin, whose name you saw on some of the
12 books in Phase 1 and a fellow named Tuck. And, again, it was
13 assigned to Sun Microsystems.

14 And, again, it went through a second examination. So
15 you will recall that the '104 went through something called
16 reissue. The '520 went through something -- through something
17 called reexamination. And, again, the upshot is that the only
18 issue you will have to decide is infringement.

19 Here is the abstract from the '520 patent. It gives
20 us a little clue about what this patent is about.

21 (Document displayed)

22 But I think the analogy I'll give you in a minute
23 will help you understand even better.

24 The disclosed system represents an improvement over
25 conventional systems for doing something called "initializing

1 static arrays," by reducing the amount of code executed by the
2 virtual machine to statistically initialize an array.

3 So static initialization of an array is a feature of
4 the Java compiler. The Java compiler you saw emits code in
5 bytecode format. And it turns out that the Java compiler
6 itself does this thing called static initialization of an array
7 a bit inefficiently, and that inefficiency has to be overcome.

8 Let me illustrate for you the inefficiency. Imagine
9 that the way we grocery shop is we start at the outside of the
10 store with our list. And we see "milk," and so we go inside
11 the store, hunt for the milk, go to the cash register, buy the
12 milk, go outside the store, look at the second item, "eggs," go
13 inside the store find the eggs, go to the cash register, buy
14 the eggs, go outside the store, et cetera.

15 That would be a pretty silly way to buy groceries.
16 But it's an approximation of just this feature or artifact, if
17 you will, of the Java compiler, that that's the way these
18 arrays or matrixes of numbers are created.

19 How do we actually shop? The way we actually shop is
20 we look at our shopping list. And if I'm not doing the aisles,
21 you know, going up and down the aisles, I look at the shopping
22 list and I go, okay, milk, that's over there in the store,
23 eggs, that's over there, vegetables, flowers, cash register.
24 And we simulate in our heads what it's actually going to look
25 like when we go in the store so we can create the most

1 efficient route through the grocery store to buy our groceries.
2 And we actually do -- I think we do this. We do a kind of
3 simulation. As we look at each item on the list, we think
4 where is it, how can I go, how can I do this efficiently?

5 This '520 Patent takes an array that is going to be
6 created on the device by this in-and-out approach that I
7 described and, instead, simulates how that array will be
8 created on the device; and in a very short, concise statement
9 creates a sequence of instructions that will create the array
10 and not use nearly as much memory as the original input.

11 And so here is the key claim language of the '520
12 Patent. You also have this chart in your stack. We simulate
13 execution of the byte codes -- that's something called the
14 clinit method -- against the memory without actually executing
15 the byte codes to identify the static initialization of the
16 array.

17 So, by analogy to the grocery list, we're going to
18 simulate our shopping trip through the grocery store without
19 actually doing it. We're going to do it in our heads. And
20 then we're going to identify a correct path through the grocery
21 store, and we're going to do -- actually, then, create an
22 instruction to ourself in our head: go do the correct path; go
23 do the short path; go do the efficient path.

24 The dispute between Google and Oracle on this patent
25 is over this expression "simulating execution." Because Google

1 claims that what they do is something called parse, not
2 simulate. Parse not simulate.

3 Now, with respect to the grocery list, if you think
4 about it, you actually go through the list as you're simulating
5 the route through the grocery store. You're looking at the
6 first item and, in a sense, you're parsing the list. You're
7 thinking eggs over here, milk over here. And you're kind of
8 doing a parsing as part of the simulation.

9 And that's exactly what is done in Android. There is
10 something called a parser. It's in a larger box called a
11 simulator. And we know that because we looked at the Android
12 code. And the Android code describes a class which knows how
13 to simulate the effects of executing the bytecode. And that
14 class is called "Simulator."

15 So Google's expert will get on the stand, and he will
16 say, We parse; we don't simulate.

17 And I hope you will remember TX 47.16 or 46.16, which
18 are the exhibits for the source code in question, which the
19 Google developers writing the code describe what they were
20 doing as simulation. We simulate the effects of executing the
21 bytecode.

22 And then Mr. Bornstein, again, described this
23 function. And he described it, again, very similar to the way
24 I've just described it to you: Sometimes you really need just
25 to have a big array of data. And if you've ever looked at what

1 something like this looks like in a class file, it's not
2 pretty. And each time you add another element, it adds more
3 elements.

4 He goes on to describe the problem that's created and
5 that needs to be solved. And he says, We only have to
6 interpret one opcode to do that entire initialization, and
7 that's the third one down, the fill array data.

8 He's talking about the simulate function and what it
9 accomplishes. And then he says, This is both a speed and space
10 efficiency win. Measured on our system libraries it saves us
11 something like a 100K.

12 So the code says "simulate." Bornstein describes the
13 function and effect in ways that line up very closely with the
14 claims of the '520 Patent.

15 Now, we have one additional layer that we need to
16 prove besides the one I described so far. So what I've
17 described so far is, you look at the claims, you look at their
18 source code, you listen to the experts. Hopefully, you
19 conclude with us that when they said "simulate," they meant
20 simulate; when they said "symbolic reference," they meant
21 symbolic reference. We win on infringement; you reject their
22 arguments.

23 The additional layer is that we are suing Google not
24 only for Google's own infringement at Google, but for putting
25 Android on the public website for others to download and then

1 to use as a set of developer tools and to install on phones.

2 And so this is called induced infringement or
3 indirect infringement, because we're holding them liable for
4 infringement by somebody else.

5 And there's some additional hurdles that we have to
6 overcome. So we have to show that Google knew about the
7 patents or was, in the words of the law, willfully blind to the
8 existence of these patents, and that they would be infringing.

9 And so that's an additional aspect of the case that
10 you'll be hearing in this phase. This will look a little
11 similar to some of the evidence you saw in Phase One. Let me
12 walk through it with you, briefly.

13 There is a book that Mr. Lindholm -- who you may
14 recall from Phase One -- published. And in that book he
15 described the '685 Patent, which you'll see on your '104 Patent
16 is that first version of the '104 Patent. And then some years
17 later he goes to Google and is advising on licensing.

18 So we have Mr. Lindholm tied directly to the
19 predecessor of the '104 Patent. And they're the same. You'll
20 see when you look at the documents they have the exact same
21 specification. The claims are slightly different. So
22 Mr. Lindholm was plainly aware, as advising the Android team on
23 licensing from Sun, of the '104 Patent.

24 But then there's e-mail after e-mail. And, again, I
25 know you've probably saw enough of internal e-mails in Phase

1 One, but we have to meet our burden and so we have to go
2 through these with you and show you them again, and persuade
3 you that Google knew about Sun's patents, and they deliberately
4 closed their eyes and didn't investigate, even as they were
5 cloning Java.

6 So TX 155 is an e-mail from Andy Rubin, reminding
7 colleagues that they maybe have solved some of the problems,
8 but Sun has patents. And, indeed, Sun had many patents.

9 And so I asked Mr. Rubin at his deposition: When you
10 wrote "they still have patents and trademarks" what was in your
11 mind about what patents Sun had?

12 And he said: Look, I assume they are running a
13 business, they are inventing intellectual property, they are
14 protecting it through the patent system. Through GPL, I didn't
15 know what they were, but I knew it was dangerous to use the
16 stuff without knowing exactly what it was.

17 So he knew that Sun had patents. And he knew that it
18 could be dangerous if you didn't know exactly what it was.

19 In 2007, Rubin writes to Bob Lee: We negotiated nine
20 months with Sun, and decided to walk away after they threatened
21 to sue us over patent violations.

22 So, again, 2007, Google was aware that Sun has
23 patents and that Sun could assert them against Google, and that
24 Google was running a lot of risk by not looking into those
25 patents, studying them, and figuring out how to avoid

1 infringement.

2 You'll recall this e-mail from Phase One. This is an
3 e-mail, TX 326, in which one of the Google executives writes
4 that it would be good for Google to buy Java from Sun because
5 the Java lawsuits go away. And he's talking there about
6 patents. In Phase One we showed you this and highlighted the
7 copyrights.

8 So what did Google do? Did Google look at the Sun
9 patents and figure out how to avoid infringement? Did Google
10 study the Sun Java-related patents, saying to itself, you know
11 what, we're getting pretty close to Java; yeah, we're creating
12 Dalvik and we're fragmenting, so it's a little different, but,
13 there's still some risk here? And did they study those
14 patents?

15 The only evidence you will hear in this trial is that
16 Google did nothing to study and examine the Sun patents in
17 order to try to avoid infringing them.

18 And so Mr. Rubin -- I asked him this question: Did
19 Google ever investigate Sun's, later Oracle Americas', patent
20 portfolio as it might relate to Android?

21 And he said, Yeah, the parts of Google that I manage
22 and I operate -- he's in charge of Android -- there was no
23 instruction to go investigate the breadth of Sun's patent
24 portfolio.

25 So Google puts Android out there. It's on a public

1 website for download by the world. They also enter into
2 contracts -- you'll be seeing those -- with various phone
3 makers, with the idea that people like Samsung, Motorola, LG,
4 these phone companies will install Android.

5 And Google is going to argue with you, well, we don't
6 know what they do. Maybe they modify the code. We don't know.
7 We just put it out there for free, for other people to use.

8 And we're going to present a lot of evidence that
9 that is just not simply so; although, it strikes one that if
10 you put something out there for people to use, it's reasonable
11 to expect that people will use it in the way that you put it
12 out there.

13 But we know that there are a lot of activations of
14 Android. From Phase One you saw 750,000 a day now. That
15 Google knows about those activations. They know that it's an
16 Android phone.

17 And you know how important it was, what kind of
18 interest Google had in getting out there quickly so that
19 Android could proliferate in the market and so that they could
20 get 750,000 activations per day.

21 You heard a lot in Phase One about clean rooms. You
22 recall I said at the outset, the basic question on infringement
23 you look at the claims, you look at the -- look at Android.
24 You'll see that the claims are in Android. If so we win.

25 No clean room issue here. It's a matter of law.

1 And, of course, Mr. Rubin knows this. So I asked him whether a
2 clean room has any bearing at all on patent infringement.
3 You're going to hear from Google that they independently
4 developed Dalvik, and it's all so different so there's no
5 reason to think we infringed.

6 Independent development is not a defense to patent
7 infringement. If the claims match what the defendant does,
8 then the defendant infringes. And Mr. Rubin acknowledged a
9 clean room approach doesn't protect against patents.

10 So unlike Phase One, where we had to tackle a lot of
11 Google's -- what we said were Google's excuses, in which there
12 was a disagreement about one of those excuses among you, in
13 Phase Two their excuses -- there just isn't a list of excuses
14 like we had to tackle in Phase One.

15 You look at the claims. You look at Android. You
16 look at the -- Android, you'll see symbolic references. You'll
17 see simulation right in the source code. And that will answer
18 the questions that are presented to you about whether Google
19 infringes.

20 There is no fair use defense to patent infringement.

21 The truth is in their own materials. What they said
22 when they were writing the code is what should guide the jury
23 in its decision-making.

24 And, once again, we are where we were at the
25 beginning of the end of Phase One. They're doing all of this

1 without a license. They knew they needed a license. They know
2 to this very day they need a license. And we're asking you for
3 help in holding them accountable.

4 Thank you very much.

5 **THE COURT:** All right. Thank you, Mr. Jacobs.

6 I think we will not require the other side to start
7 now because it's only 15 minutes until 1:00, and it will be
8 best, I think, to start fresh in morning.

9 **MR. VAN NEST:** I think that would be a lot better,
10 Your Honor. Thank you.

11 **THE COURT:** That's what we'll do then. We'll give
12 you the rest of the day off a little early today. Please
13 remember to be on time tomorrow. We thank you for your
14 continued diligence in paying such close attention. See you
15 here in the morning. Remember the admonition.

16 **THE CLERK:** All rise.

17 (Jury out at 12:48 p.m.)

18 **THE COURT:** Be seated, please. Any issues for the
19 Court?

20 **MR. JACOBS:** None from us, Your Honor.

21 **MR. VAN NEST:** I don't believe so, Your Honor.

22 **THE COURT:** All right. So we'll resume at 7:30 in
23 the morning. Have a good day.

24 **MR. VAN NEST:** Thank you.
25

1 (At 12:48 p.m. the proceedings were adjourned until
2 Tuesday, May 8, 2012, at 7:30 a.m.)

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Monday, May 7, 2012